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CASE NO. ________

THE SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY, Jr.,

Petitioner,

v.

LLOYD DUEST,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT OF APPEALS, FINDING OF HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON v. MISSISSIPPI, 486 U.S. 578, 108 S. Ct. 1981, 100 L.Ed.2d 575 (1988), IS CONTRARY TO THIS COURT'S PRONOUNCEMENTS IN SOCHOR v. FLORIDA, 504 U.S. __, 119 L.Ed.2d 329, 112 S. Ct. __ (1992), AND GRIFFIN v. UNITED STATES, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991)

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), and is reproduced in the appendix to this pleading.[1] The order denying rehearing was rendered on October 7,

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[1] [A-] represents citation to the materials contained in the appendix to this pleading.

1992 and is reproduced in the appendix to this pleading. [A-1-A-62].

The decision of the United States District Court for the Southern District of Florida, issued September 14, 1990 is unreported. The decision is reproduced in the appendix to this pleading. [A-63-A-173].

The decision of the Florida Supreme Court denying Duest's Johnson v. Mississippi claim is reported at 555 So.2d 849 (Fla. 1990), also set forth in the appendix to this pleading [A-174-A-198].

The decision of the Florida Supreme Court regarding Duest's direct appeal is reported at Duest v. State, 462 So.2d 446 (Fla. 1985), and is reproduced in the appendix to this pleading. [A-199-A-212].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on July 15, 1992. A petition for rehearing and suggestion for rehearing in banc was filed and subsequently denied on October 7, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States: nor shall any

> state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X, which provides that:

> Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

Lloyd Duest was indicted for the first degree murder of John Pope in Fort Lauderdale, Florida. The indictment alleged that on Valentine's Day weekend Duest picked up John Pope from a gay bar, returned to the victim's home and repeatedly stabbed him to death.

The record reflects that Duest came to Florida by bus from Massachusetts, the weekend of February 12, 1982. Upon his arrival, he told a witness that he was going to go to a gay bar to roll a fag. During the weekend, Duest was seen with Mr. Pope leaving a gay bar. Later that day Duest was seen alone driving the victim's car. Blood stains were seen on Duest's clothes, and the victim's jewelry was found in the car driven by Duest. Later that evening, Pope's roommate discovered the victim's nude body on the bathroom floor. He had been repeatedly stabbed. The struggle started in the victim's bed and ultimately ended in the bathroom. Duest was also in possession of a seven-inch knife during that time.

At trial Duest presented an alibi defense through several witnesses who claimed that he was in Massachusetts at the time of the murder. At sentencing the State presented evidence of Duest's two prior violent felony convictions as an aggravating circumstance. Duest presented testimony of various family members. The trial court found five aggravating factors to be supported by the evidence.[2] The trial court found no mitigating evidence applied to the case. The trial court imposed the death penalty. The Florida Supreme Court affirmed the conviction and sentence of death in Duest v. State, 462 So.2d 446 (Fla. 1985).

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[2] The aggravating factors were: 1) the capital felony was committed while the defendant was engaged in the commission of a robbery, Section, 921. 141 (5)(d) Fla. Stat. (1985); 2) the capital felony was committed for pecuniary gain, Section 921.141 (5)(f); 3) the capital felony was especially heinous, atrocious, or cruel, Section 921. 141 (5)(h); 4) the capital felony was a homicide which was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal jusitification, Section, 921.141 (5)(i); and 5) the defendant has previously been convicted of a prior violent felony.

The trial court considered the aggravating circumstances 1 and 2 as one because of the overlapping facts. Duest v. State, 462 So.2d 446, 449 (Fla. 1985).

In 1987, Duest sought post-conviction relief in the state trial court. While the motion was pending, the Governor signed a death warrant. After an evidentiary hearing, the trial court denied relief. The Florida Supreme Court refused to grant a stay of execution and affirmed the trial court's denial of relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990).[3] The Florida

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[3] The Florida Supreme Court specifically addressed Duest's Johnson v. Mississippi issue, concluding that any error was harmless beyond a reasonable doubt because "there is still a basis for the aggravating circumstance of a prior conviction of a violent felony." Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990).

Supreme Court also denied all relief from Duest's state habeas corpus petition. Duest, supra.

Duest then petitioned for federal habeas relief in the United States District Court for the Southern District of Florida. Judge Ryskamp granted a stay of execution. Following the filing of further pleadings and oral argument, the district court denied all relief on September 14, 1990. Judge Ryskamp determined that any error under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), was harmless beyond a reasonable doubt. An appeal was taken to the Eleventh Circuit. On July 15, 1992, a panel of the Eleventh Circuit Court of Appeals reversed the district court's finding of harmless error regarding Duest's Johnson v. Mississippi, claim.

The State, in its suggestion for rehearing in banc of the panel decision, relied heavily on this Court's decisions in Sochor v. Florida, 504 U.S. __, 119 L.Ed.2d 329, 112 S.Ct. __ (1992), and Griffin v. United States, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991). Rehearing was subsequently denied on October 7, 1992.

REASONS FOR GRANTING THE WRIT

WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS, FINDING HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON v. MISSISSIPPI, IS CONTRARY TO THIS COURT'S PRONOUNCEMENTS IN SOCHOR v. FLORIDA, 504 U.S. --, 119 L.Ed.2d 329, 112 S.Ct. __ (1992), AND GRIFFIN v. UNITED STATES, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991).

Lloyd Duest was convicted of two prior violent felonies in Massachusetts in 1970: 1) armed robbery, and 2) aggravated assault with intent to murder. Both felonies were argued as the basis for the aggravating factor that the defendant had previously been convicted of a prior violent felony.[4] Duest v. State, 462 So. 2d 446, 449 (Fla. 1985). Subsequent to his direct appeal on the Florida murder conviction, Duest's conviction for aggravated assault with intent to murder was vacated on a technicality. In reversing the conviction, the Massachusetts appellate court noted that:

> The Commonwealth acknowledges that it cannot meet its burden of establishing the circumstances of the plea to the indictment charging armed assault with intent to murder. Note 1, supra. There is no proof that the defendant harbored a specific intent to murder or kill when shots from a pistol were fired out the window of the getaway vehicle at the police cruiser chasing that vehicle. The only

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[4] Id, 921.141 (5)(b).

> evidence on that point is to the effect that the shots were fired at the pursuing police officers in the cruiser. The record, therefore, is fatally deficient on the essential mental element of armed assault with intent to murder, as that element has been clarified by Commonwealth v. Henson, 394 Mass. 584 (1985).

Commonwealth v. Duest, 26 Mass. App. Ct. 137, 138-139, n. 2.

Due to the fact that the aforementioned prior conviction was vacated, a panel of the Eleventh Circuit found harmful Eighth Amendment error based on Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Regardless of the fact that the jury in Duest's murder case received less exposure to the vacated conviction than did the jury in

Johnson,[5] the panel still found harmful error because the jury recommended death by a vote of seven to five[6] and, during deliberations, the jury requested a copy of both of Duest's prior convictions. The court determined that:

> Although the jury in this case received less exposure to the vacated conviction than did the jury in Johnson, the circumstances surrounding the jury's consideration of this conviction indicate that reversible error occurred here

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[5] The prosecutor never mentioned the underlying felonies used to prove this aggravating factor during his closing argument. The jury was instructed on all the factors and was told that both the armed robbery and the aggravated assault would qualify as proof of the circumstance.

[6] The actual vote of the jury regarding its recommendation, is irrelvant. The standard to be applied in assessing harmful error is one of reasonable probability. Strickland v. Washington, 466 U.S. 668, 695 (1984); Bertolotti v. Dugger, 883 F.2d 1503, 1519, n. 12 (11th Cir. 1989). The analysis does not vary according to the number of jurors who voted one way or another.

as well. The fact that the jury requested to see the vacated convictions after having deliberated for a time suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence. It is important to note that the jury did not request additional information or instruction from the trial court on any other matter. It is unclear from the record how much time elapsed between the jury's request and its arrival at a recommendation of death; nevertheless, the fact that the entire sentencing hearing took only one day, combined with the other circumstances surrounding the jury's determination, further calls into question the reliability of the jury's recommendation. Finally, that the jury recommended death by the narrowest of margins renders its consideration of the vacated conviction especially problematic. Thus, the context in which the sentencing jury considered Duest's conviction undermines confidence in the jury's recommendation of death as much as the context in which the jury imposed death in Johnson.

> The Johnson Court rejected a finding of harmless error not only because of the jury's particular exposure to Johnson's vacation conviction, but also because "the error [in Johnson] extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 486 U.S. at 590, 108 S.Ct. at 1989. The Clemons Court reemphasized this distinction in holding that the Mississippi Supreme Court was not precluded from conducting a harmless error analysis on remand where the trial court, rather than admitting inaccurate and misleading evidence, merely had given an erroneous instruction regarding application of the "especially heinous atrocious and cruel" aggravating circumstance. Clemons, 494 U.S. at 754-55 n. 5, 110 S.Ct. at 1451 n. 5.

Duest, 967 F.2d at 481-482.

The Circuit Court's characterization of the evidence regarding aggravated assault as materially inaccurate, is incorrect. Duest, 967 F.2d at 482. The court acknowledged that Duest did in fact commit the aggravated assault.[7] Id. The inaccuracy is related specifically and only to Duest's intent during commission of the aggravated assault.[8] It cannot be emphasized enough as well as conceded by the panel, that Duest did commit the aggravated assault. Furthermore, unlike Johnson, in the case at bar there was evidence remaining that was relevant to sentencing. The jury knew Duest had committed the crime, and the State still had the prior conviction for armed robbery that sustained the finding of the aggravating factor.[9] These relevant facts along with the Court's concession that the prior felony was not emphasized, makes the case sub judice distinguishable from Johnson and warrants reversal of the panel's decision.

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[7] This Court has found no constitutional error to exist when a state relies on testimony of a prior crime for which a defendant is acquitted. Dowling v. Unites States, 493 U.S. 342, 107 L. Ed.2d 708, 110 S. Ct. 668 (1990). That holding has been extended to penalty phase evidence as well. Florida v. Burr, 496 U.S. 914, 110 L. Ed. 2d 629, 110 S. Ct. 2608 (1990). Consequently any error in admitting evidence of collateral crimes for which there has been no conviction is merely an error of state law. Barclay v. Florida, 463 U.S. 939, 77 L. Ed.2d 1134, 103 S.Ct. 3418, reh den (U.S.) 78 L. Ed. 2d 185, 104 S.Ct. 209 (1983); Wainright v. Goode, 464 U.S. 78, 78 L. Ed.2d 187., 104 S. Ct. 378 (1983). Consequently, any evidence regarding Duest's criminal actions against the two police officers is constitutionally admissible.

[8] At sentencing, the jury was told that Duest admitted to the crime as he pled guilty to the offense.

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[9] In Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), this Court held that Johnson must be presumed innocent of the vacated assault since the only evidence the state had consisted of a document establishing that the defendant had been convicted of that offense. The relevance of that document was lost when the conviction was vacated. The Court observed that other evidence would have supported the criminal conduct had it been introduced at trial.

The panel's analysis and ultimate conclusion is contrary to this Court's decisions in Sochor v. Florida, 540 U.S. __, 119 L.Ed.2d 329, 112 S.Ct. __ (1992); Griffin v. United States, 504 U.S. __, 119 L.Ed.2d , 112 S.Ct. __ (1992). In Sochor, this Court refused to find any Eighth Amendment error regarding an imprecise/improper jury instruction for the aggravating factor of "heinous, atrocious, and cruel.[10] Since there was sufficient evidence to sustain the finding of that factor in Sochor's case, no reversible error occurred.

In the case at bar, the Florida Supreme Court applied the correct harmless error analysis:

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[10] Section, 921.141 (5)(h)(1985).

> We believe beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of this conviction.
>
> In Johnson, the Supreme Court vacated a death sentence predicated on part on the aggravating circumstance of prior conviction of a violent felony when the conviction upon which the aggravating circumstance was based was later set aside. However, in the instant case evidence was introduced that Duest had also been convicted of armed robbery. This conviction remains undisturbed. Therefore, there still is a basis for the aggravating circumstance of prior conviction for a prior violent felony. Bundy v. State, 538 So.2d 445 (Fla. 1989); Daughtery v. State, 533 So.2d 287 (Fla. 1989). In Burr, the evidence of a collateral crime later held to be inadmissible provided much of the basis for two of the three aggravating circumstances.

Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990).

The district court also applied a harmless error analysis:

As required by Chapman (citation omitted), the Florida Supreme Court applied the proper "beyond a reasonable doubt" standard when conducting its harmless error analysis. Duest, 555 So.2d at 851; see Clemons, __ U.S.__, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. First, the court recognized that this case is distinguishable from Johnson, because even considering the vacated conviction, Duest still had an undisturbed conviction for armed robbery. Duest, 555 So.2d at 851. Because of that remaining conviction, "a basis still existed for the aggravating circumstance of prior conviction of a violent felony." Id. (citing Bundy v. State, 538 So.2d 445 (Fla. 1989); Daugherty v. State, 533 So.2d 287 (Fla.), cert. denied, 488 U.S. 959, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988)). Further, the supreme court noted that three other valid aggravating circumstances applied to Duest's sentence and concluded that "even if we were to find that one or two of the aggravating circumstances found by the trial judge, [sic] was inapplicable, it would still be appropriate to maintain the death penalty. Id. (quoting Duest v. State, 462 So.2d at 450).

Considering the forgoing, it appears that the Florida Supreme Court concluded that it was beyond a reasonable doubt that Duest's sentence was unaffected by consideration of the prior Massachusetts's conviction, which was later vacated because the aggravating factor of a prior violent felony still existed and was thus properly considered in the balance of aggravating and mitigating circumstances. Under Clemons, __ U.S. at __, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. In contrast to Clemons, the record supports the Florida Supreme Court's conclusion that the error in Duest's case was harmless. Here, the state did not emphasize repeatedly and argue the conviction that was later vacated to place little emphasis on the other violent felony conviction that remained. See Clemons, __ U.S. at __, 110 S.Ct. at 1451, 108 L.Ed.2d at 741; see also Johnson v. Mississippi, 511 So.2d 1333, 1338 (Miss. 1987) (state repeatedly argued invalidated aggravating circumstance), reversed, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Instead, the trial judge merely read both indictments to the jurors and informed them that the

> convictions had been rendered on those indictments. Supplemental brief at 2. Having reviewed the record, the court concludes that the consideration of the vacated conviction was harmless error that does not require remand for a new sentencing hearing.

The evidence presented to the Eleventh Circuit was the same evidence presented to both the Florida Supreme Court and the district court. That Court did not possess any more knowledge than either of the lower courts, consequently, the panel was in no better position to judge harmless error. Despite these circumstances, the panel found harmful error. The panel's decision to ignore the critical fact that there was sufficient evidence to sustain the existence of this factor, absent the aggravated assault with intent to murder, is unreasonable and is in direct conflict with Sochor. The circuit court's analysis and ultimate conclusion that harmful error occurred in the instant case has resulted in a per se reversible error rule for a Johnson v. Mississippi claim. Review by this Court is therefore necessary.

The Eleventh Circuit's decision/analysis is also contrary to this Court's decision in Griffin v. United States, 502 U.S. __, 116 L.Ed.2d. 371, 112 S.Ct. __ (1992). When faced with two separate theories of proof, one supported by the evidence, the other one not, this Court refused to speculate or presume that a jury would rely on a theory with insufficient evidence to sustain the findings. Griffin, 502 U.S. __, 116 L.Ed.2d at 380-81. The panel presumes that Duest's jury would not have found the aggravating factor of prior violent felony if they were not told about the aggravated assault with intent to murder. This analysis presumes that the jury would have ignored the prior conviction for armed robbery, even though they were instructed that the armed robbery was a sufficient basis for finding the aggravating factor.[11] That presumption is in direct conflict with Griffin. If one cannot presume that a jury would erroneously convict absent sufficient proof, a fortiori, one cannot presume a jury would erroneously refuse to consider a factor which is supported by the evidence.[12] To suggest that simply because there was insufficient evidence of intent to murder when Duest assaulted the police officers with a dangerous weapon, a jury would then ignore the armed robbery and not recommend death is mere speculation.

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[11] The jury was told: "You are instructed that the crimes of armed assault to murder and armed robbery are felonies involving the use or threat of violence to another person.

[12] The panel's decision makes much of the fact that the jury requested to see a copy of the prior convictions. Duest v. singletary, 967 F.2d 472, 481-482 (11th Cir. 1992). Petitioner fails to

Lastly the panel's decision is contrary to Sochor in that the harmless error analysis was incomplete. Once the panel speculated that the jury was more persuaded by one portion of evidence over another piece of evidence, i.e., the aggravated assault with intent to murder weighed more heavily in the jurors's minds than did the armed robbery, the panel assumed that its

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see how this supports the panel's decision. The jury requested to see both of the prior convictions. This would lend support to Petitioner's claim that the jury did not place any greater emphasis on the aggravated assault conviction than it did on the armed robbery. Indeed both crimes involve violence.

analysis was complete. The panel was in error. Sochor illustrates that consideration as to what the sentencing judge found and weighed in its death determination is critical in a harmless error review given the trial court's role in sentencing. Id, 504 U.S.at __, 119 L.Ed.2d at 341-342.[13] If the panel had considered the trial court's original sentencing order (State trial court sentencing order, dated April 14, 1983, pg. 1), and the trial court's order denying this claim in the collateral proceeding (State trial court's order denying Rule 3.850 relief, dated January 5, 1990, pg. 2), it would not have had to speculate as to what weight was given any particular evidence. The trial court,[14] held that the error was harmless as Duest had also been convicted of armed robbery. The trial court determined that since the armed robbery was sufficient to satisfy the aggravating factor of prior violent felony,[15] Duest would still have been sentenced to death (State trial court's order denying Rule 3.850 relief, dated January 5, 1990, pg. 2). Given that the actual sentencer has stated that death would still have been imposed because of the remaining prior violent conviction, there is no need to engage in any speculation.

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[13] The judge is the actual sentencer in Florida and is required to make specific written factual findings in support of a death sentence. Section 921.141(3), Fla. Stat. Grossman v. State, 525 So.2d 833 (Fla. 1988); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

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[14] The trial judge who presided over appellant's collateral proceedings is the same judge who sentenced Duest to death.

[15] Under Florida law, a single prior conviction with violence proves this aggravating fdactor beyond a reasonable doubt.

The Florida Supreme Court unequivocally stated that absent the prior conviction there still exist a basis for the aggravating factor, consequently the error was harmless beyond a reasonable doubt. Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990). The Court further noted that even if the aggravating factor was found to be invalid, the death sentence was still the appropriate penalty. Id.[16] The district court, in making a de novo review of the Florida Supreme Court's analysis under Chapman v. California,

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[16] A review of the Florida Supreme Court's opinion reveals that the Court did in fact conduct a harmless error analysis, consequently any other reviewing court is not faced with any ambiguity. See Sochor v. Florida, 504 U.S. __, 119 L.Ed.2d 326, 341-342, 112 S.Ct. __ (1992).

386 U.S. 18 (1967), determined that the error was in fact harmless beyond a reasonable doubt. The district court correctly concluded that since there still remained a prior conviction to satisfy the finding of that aggravator, the error was harmless. Furthermore, the state did not emphasize either of the two prior convictions as was the case in Johnson. Consequently, the district court, applying the proper harmless error standard, found that Duest would still have been sentenced to death absent a portion of one of the four aggravating factors that existed.

In summary, the panel's analysis was faulty and incomplete. Furthermore, the court's refusal to find harmless error is incorrect. The court's fixation with the fact that the jury mistakenly was told that Duest intended to murder the two police officers during his aggravated assault upon them is unreasonable. The panel's erroneous analysis is highlighted by the court's acknowledgment that Duest did in fact commit the crime of aggravated assault. The evidence was simply insufficient to prove that he intended to kill them when he shot at them. In essence, the panel concluded that a defect in some of the evidence presented to support a factor that still remained[17] absent the defect, coupled with three other aggravating factors is not harmless error.[18]

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[17] There has been no successful challenge to the prior conviction for armed robbery.

[18] Contrary to the panel's assertion otherwise, Duest v. Singletary, 967 F.2d 472, 842 n. 11, the State never suggested, let alone conceded, that the evidence presented at sentencing would have resulted in a life recommendation, nor that same would have precluded an override of that recommendation. The panel's statement otherwise, is patently

Ironically, the prosecutor only needed one of these prior convictions to prove this factor, consequently there could not possibly have been any error if the jury had only been told of the one prior conviction for armed robbery. The aggravating factor would still have been found and Duest would still have been sentenced to death. The panel's decision to ignore the findings of the sentencing court[19] and reverse the findings of two other reviewing courts is unreasonable. The analysis employed

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inaccurate. This mischaracterization is further exacerbated by the panel's sua sponte determination that the mitigating evidence would have precluded a jury override. Such a determination was made without the benefit of any state court's interpretation of state law as it applies to the instant case. Francis v. Dugger, 908 F.2d 595, 704 (11th Cir. 1990).

[19] See trial court's order denying Rule 3.850 relief dated January 5, 1990, page two.

by the circuit court is tantamount to per se reversible error involving any Johnson v. Mississippi claim.

The decision to presume/speculate as to what weight the jury gave to appellant's aggravated assault with intent to murder violates Sochor and Griffin. Furthermore the panel's failure to take into account the findings of the actual sentencer also violates Sochor.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that the petition for writ of certiorari be granted and a summary reversal entered based on Griffin and Sochor, supra.

Respectfully submitted,

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CASE NO. ______
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Duest v. Singletary,
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Opinion
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Southern District of Florida
September 14, 1990 A63-173

Duest v. Dugger,
555 So.2d 849 (Fla. 1990) A173-A198

Duest v. State,
462 So.2d 446 (Fla. 1985) A199-A212

LLOYD DUEST, Petitioner-Appellant,

v.

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,
Respondent-Appellee.

No. 90-6009.

United States Court of Appeals,
Eleventh Circuit

July 15, 1992.

After his conviction of first-degree murder and death sentence were affirmed on direct appeal, 462 So.2d 446, and denial of his request for postconviction relief was affirmed, 555 So.2d 849, petitioner sought habeas relief. The United States District Court for the Southern District of Florida, No. 90-6045-CIV, Kenneth L. Ryskamp, J., denied petition, and petitioner appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) failure to disclose bus ticket that would have corroborated portion of petitioner's alibi defense was not Brady violation, but (2) jury's consideration of conviction and sentence that was later vacated was reversible error under Eighth Amendment.

Conviction affirmed; denial of writ reversed, death sentence vacated, and matter remanded.

Martin J. McClain, Tallahassee, Fla., for petitioner-appellant.

Celia A. Terenzio, Asst.Atty.Gen.,West Palm Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

Petitioner Duest was convicted of the first-degree murder of John Pope and sentenced to death. The Florida Supreme Court affirmed Duest's conviction and sentence on direct appeal, Duest v. State, 462 So.2d 446 (Fla. 1985), and denied all post-conviction relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990). Duest now appeals from the district court's denial of a writ of habeas corpus, which petitioner sought on several grounds. We affirm the district court's denial of relief with respect to Duest's conviction for first-degree murder. Because, however, the sentencing jury's consideration of a conviction and sentence later vacated by the Commonwealth of Massachusetts constituted reversible error under the Eighth Amendment and Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct.

1981, 100 L.Ed.2d 575 (1988), we vacate Duest's death sentence and remand to the district court.

I. BACKGROUND AND COURSE OF PROCEEDINGS

John Pope was last seen alive on February 15, 1982 (President's Day), in Ft. Lauderdale, Florida, and was found dead early the following morning. Duest was arrested April 18, 1982, and on May 21, 1982, was charged by indictment with Pope's murder. During the March 1983 trial, held in Broward County, Florida, Duest relied on an alibi defense, presenting both testimonial and documentary evidence that he had been in Massachusetts throughout President's Day Weekend (February 13-15) 1982 and until April 5, 1982, on which date he had arrived in Florida on a Trailways bus. In response, the prosecution presented seven witnesses, all of whom testified that they had seen Duest in the Ft. Lauderdale area during President's Day Weekend, and some of whom testified that they had seen Duest with Pope hours before the latter was found dead. Although the prosecution suggested that Duest's alibi witnesses had merely confused the dates of his appearance in and departure from Massachusetts, the prosecution never explicitly argued that Duest had not been in Massachusetts on April 5. The jury convicted Duest of first-degree murder on March 18, 1983.

On the following day, the penalty phase of the proceedings commenced. At this time, the government sought, inter alia, to show that Duest's prior criminal record contained two convictions for crimes of violence.

Under Florida law, such crimes constitute an aggravating circumstance to be weighed by a sentencing jury against evidence of statutory and nonstatutory mitigating evidence. Fla.Stat.Ann. §921.141(5)(b).[1] To establish this aggravating circumstance, the prosecution introduced into evidence two convictions from the Commonwealth of

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[1] Florida is a "weighing" state. In the sentencing phase of a capital trial, the jury must determine (1) whether sufficient aggravating circumstances exist as enumerated in Fla.Stat.Ann. §921.141(5), (2) whether mitigating circumstances, both statutory and nonstatutory, exist which outweighed the aggravating circumstances, and (3) based on this calculus, whether death is the appropriate sentence. Fla.Stat.Ann. §921.141(2). Unlike other weighing states such as Mississippi, however, the sentence reached by a Florida capital jury is purely advisory. Under Fla.Stat.Ann. §921.141(3), the trial court, the sentencer under Florida law, must itself ultimately weigh aggravating and mitigating circumstances in determining whether death is the appropriate sentence. Fla.Stat.Ann. §921.141(3).

Massachusetts: one for armed robbery, and the other for armed assault with intent to murder.[2] After the introduction of the second conviction, the sentencing court spoke to the jury as follows:

> State's Exhibit No. 2 is a certified copy from the Commonwealth of Massachusetts, Superior Court, Department of the Trial Court. This is a conviction for armed assault to murder. The defendant pled guilty on January 13, 1971, and was sentenced to a term not exceeding ten years, nor less than five years. I

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[2] Duest had pled guilty to both crimes.

will read this Indictment to you, also. It says, "Commonwealth of Massachusetts. The Superior Court. At the City of Cambridge, within and for the County of Middlesex, on the first Monday of April, in the year of our Lord one thousand nine hundred and seventy, the jurors for the Commonwealth of Massachusetts on their oath present that Lloyd Paul Duest on the 4th day of March in the year of our Lord one thousand nine hundred and seventy, at Reading, in the County of Middlesex, aforesaid being

> armed with a dangerous weapon, did assault Herbert McSheehy and Leo Iacopucci...with intent to murder them against the peace of said Commonwealth and contrary to the Statute in such case and provided..."

Trial Transcript at 1574-75. The court gave to the jury no additional facts regarding this conviction other than those contained in the Indictment.

After the jury returned from deliberating over Duest's sentence, it asked to see the criminal records pertaining to Duest's Massachusetts convictions. Id. at 1631. The court proceeded to re-read to the jury each indictment and notice of guilty plea and sentence. Id. at 1631-33. After this second reading, the jury returned to its deliberations, and subsequently recommended a sentence of death by a seven to five vote. It is not clear from the record how much time elapsed between the time the court re-read the prior convictions to the jury and the time that the jury recommended death; the sentencing phase, however, lasted only one day. On April 24, 1983, the trial court accepted the jury's recommendation and sentenced Duest to death. The trial court found four aggravating factors to exist, including the "prior crimes of violence" circumstance listed in Fla.Stat.Ann. §921.141(5)(b), and none of the statutory mitigating factors listed in Fla.Stat.Ann. §921.141(6).

The Florida Supreme Court affirmed Duest's first-degree murder conviction and death sentence. Duest v. State, 462 So.2d 446 (Fla. 1985). Subsequently, the Massachusetts Court of Appeals vacated Duest's conviction for armed assault with intent to murder on the grounds that the indictment did not charge Duest with conduct sufficient to prove he acted with intent to murder. Commonwealth v. Duest, 26 Mass. App.Ct. 137, 524 N.E.2d 1368 (1988).[3] On

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[3] Duest's 1988 appeal involved his attempt to withdraw his pleas as to both of the aforementioned convictions. Under Commonwealth v. Henson, 394 Mass. 584, 476 N.E. 2d 947 (1985), a case decided after Duest's conviction but given retroactive effect, Massachusetts treated armed assault with intent to murder as attempted murder, requiring proof of intent. Duest argued that the indictment charging assault with intent to murder did not reflect evidence of intent to murder. The Commonwealth of Massachusetts agreed with Duest's contention in light of Henson; therefore, the Massachusetts Court of Appeals accepted the withdrawal of

October 20, 1988, the armed assault charge against Duest was nolle prossed. Duest then moved for post-conviction relief under Fla.R.Crim.P. 3.850, alleging, inter alia, that the sentencing jury's consideration of Duest's vacated prior conviction in Massachusetts was invalid, and that resentencing was required. While conducting discovery after the filing of that motion, Duest's counsel discovered in the State files containing Duest's personal effects a Trailways bus ticket, bearing no name, showing travel from Boston to Ft. Lauderdale on April 5, 1982. Duest proceeded to amend his 3.850 motion to include a claim that the government, by withholding the bus ticket, had withheld material

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Duest's plea and accordingly vacated his conviction.

exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215 (1963), and that therefore a new trial was necessary. On January 4, 1989, the trial court held evidentiary hearings on the Brady issue and on Duest's claim that the jury's consideration of the vacated Massachusetts conviction required resentencing, but ultimately denied Duest all relief on the 3.850 motion. At the hearings, the State conceded that the defendant had put on a wealth of non-statutory mitigating evidence at trial.

Duest then petitioned for a writ of habeas corpus in state court, alleging, inter alia, (1) the Brady violation referred to supra, as well as other Brady claims; (2) that the sentencing jury's improper consideration of a prior conviction that had subsequently been vacated by the Massachusetts courts entitled Duest to a new sentencing proceeding, under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); and (3) ineffective assistance of counsel at the guilt, sentencing and appellate phases of the proceedings.

The Florida Supreme Court denied habeas relief and affirmed the trial court's denial of Duest's motion for Rule 3.850 post-conviction relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990). On the Brady issue, the Court held that although the State had inadvertently failed to furnish the bus ticket to the defense, the introduction of the ticket would not have affected the outcome of the case, given the jury's complete rejection of Duest's alibi defense. Duest v. Dugger, 555 So.2d at 850-51. The Court also rejected Duest's claim under Johnson v. Mississippi, stating that it "believe[d] beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of [the vacated] conviction." Id. at 851. The Florida Supreme Court also denied relief on the remainder of Duest's claims.

Duest then petitioned for habeas relief in Federal District Court, asserting 25 different claims. In an Order dated September 19, 1990, the district court denied relief on all claims, holding that some of the claims were procedurally barred, and that others had no merit. Duest v . Dugger, No. 90-6046-CIV-RYSKAMP-(S.D.Fla. Sept. 19, 1990) (hereinafter "September 19 Order"). Duest appeals the district court's determination as to several of these claims. Specifically, Duest makes the following arguments before this court:

> (1) Duest is entitled to a new trial in light of the government's withholding of material exculpatory evidence under Brady (Issue I);
>
> (2) Resentencing is appropriate because of the sentencing jury's impermissible consideration of the vacated Massachusetts conviction (Issue II);
>
> (3) An evidentiary hearing on the issue of ineffective assistance of counsel at sentencing must be held in district court (Issue III).

(4) Duest was denied effective assistance of counsel at trial by virtue of his lawyer's failure to object to improper prosecutorial statements during the guilt and sentencing phases (Issue IV);

(5) Duest was denied effective assistance of appellate counsel by virtue of appellate counsel's failure to raise several different issues on appeal (Issue V);

(6) There was insufficient evidence to convict Duest of first-degree murder (Issue VI);

(7) The trial court committed reversible error at sentencing by issuing insufficient instructions regarding

aggravating factors, in violation of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988) (Issue VII);

(8) Duest's was denied his right to a fair trial because of the introduction at trial of flight evidence and evidence of Duest's use of an alias (Issue VIII);

(9) the trial court committed reversible error at sentencing when it instructed the jury that a majority vote (seven of twelve jurors) was needed to return a verdict of life imprisonment as opposed to death (Issue IX); and

(10) Resentencing is appropriate because the trial

court's penalty phase instructions impermissibly shifted the burden of proof to Duest to prove that life imprisonment was the appropriate punishment (Issue X).

As noted supra, we affirm the district court's denial of habeas relief regarding Duest's conviction, but reverse the district court's denial of relief regarding sentencing.

II. DUEST'S CONVICTION

Duest makes several claims regarding the alleged unlawfulness of his conviction, including those claims identified supra as Issue I (the Brady violations); Issue IV to the extent the prosecutorial misstatements took place at the guilt phase of the trial); Issue V (to the extent that appellate counsel failed to raise on appeal issues arising out of the guilt phase of the trial); Issue VI (sufficiency of the evidence); and Issue VIII (erroneous admission of flight evidence and evidence of use of an alias).

Because Duest's Brady claim is the sole claim pertaining to Duest's conviction that merits extended treatment here, we reserve that discussion for last, and address Duest's other claims first.

A. Ineffective Assistance of Counsel - Guilt Phase (Issue IV)

[1-3] With respect to Duest's claim that he was denied ineffective assistance of trial counsel at the guilt phase by virtue of his counsel's failure to object to improper prosecutorial statements, we note that in order to prove ineffective assistance of counsel, a habeas petitioner must show that his

lawyer performed deficiently, and that such deficient performance prejudiced his client. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *United States v.Yizar*, 956 F.2d 230, 232 n.8 (11th. Cir. 1992). An ineffective assistance of counsel claim presents a mixed question of law and fact and is therefore subject to *de novo* review. *Lusk v. Dugger*, 890 F.2d 332, 336 (11th. Cir.), *cert. denied*, ___U.S.___, 110 S.Ct. 3297, 111 L.Ed.2d 805 (1990).

[4] In this case, whether or not trial counsel behaved deficiently, his failure to object to the prosecutor's allegedly improper statements did not prejudice his client. To prove prejudice, petitioner must show that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Yizar, 956 F.2d at 232 n. 13 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068). Prosecutorial misstatements do not constitute reversible error unless such misstatements render the trial so fundamentally unfair as to amount to a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 645, 94 S.Ct 1868, 1872, 40 L.Ed.2d 431 (1974). Given the nature of the (mis)statements in this case, the prosecutor's behavior in this case did not render Duest's trial so fundamentally unfair as to amount to a denial of due process. Thus, any objection by defense counsel would have proven fruitless. Defense counsel's failure to object to these statements were not ineffective assistance.

B. Ineffective Assistance of Appellate Counsel (Issue V)

[5] With respect to Duest's allegations on ineffective assistance of appellate counsel for failure to raise on appeal claims arising out of the guilt phase of Duest's trial, it is claim that the petitioner has not sustained his burden of proving prejudice resulting from appellate counsel's alleged deficient performance. See Strickland, supra.[4] In assessing

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[4] The standard of proof and standard of review are the same in the context of ineffective assistance of appellate counsel as in the context of ineffective assistance of trial counsel. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291(1984).

the likelihood of success of a direct appeal, we must accord deference to the Florida Supreme Court's decisions to the extent the Court has decided one of the underlying state law issues giving rise to the ineffective assistance claim. Alvord v. Wainwright, 725 F.2d at 1291. Duest contends that appellate counsel was ineffective for failing to raise on appeal (1) the trial court's admission of flight evidence at trial; and (2) the trial court's admission of collateral misconduct.

In denying Duest state habeas relief and in affirming the trial court's denial of Duest's 3.850 motion, however, the Florida Supreme Court addressed petitioner's substantive state law claims on the merits. The court concluded that under prevailing Florida law, petitioner's arguments regarding the admission of flight and alias evidence "would have been unavailing had it been raised on appeal." Duest v. Dugger, 555 So.2d at 852, and that the admission of collateral conduct was, at most, harmless error. Id. at 853. Thus, given the Florida Supreme Court's rejection of Duest's underlying state claims, no prejudice resulted from the failure of Duest's appellate counsel to raise these claims on appeal.

C. Insufficient Evidence of First-Degree Murder (Issue VI)

[6] We find no merit to Duest's contention that there was insufficient evidence to convict him of first-degree murder. To prevail on a sufficiency of the evidence claim, petitioner must show that, viewed in the light most favorable to the prosecution, the evidence in this

case could not have permitted a reasonable trier of fact to conclude that Duest was guilty beyond a reasonable doubt of first-degree murder. Jackson v. Virginia,443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Petitioner cannot make such a showing in this case.

D. Introduction of Flight/Alias Evidence (Issue VIII)

[7] The Florida Supreme Court relied on an independent and adequate state procedural ground - that is, Duest's failure to raise the issue of improper introduction of flight and alias evidence on direct appeal - in denying relief on this claim. Duest v. Dugger, 555 So.2d at 851. Therefore, Duest is procedurally barred from raising this claim in a federal habeas proceeding. Wainwright v. Sykes, 433 U.S. 72, 81-83,

97 S.Ct. 2497, 2503-04, 53 L.Ed.2d 594 (1977).[5]

E. Brady Violation (Issue I)

[8,9] In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." Brady, 373 U.S. at 87, 83 S.Ct. at 1197. In United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court noted that "evidence is material only if there

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[5] As noted in Section II.B, supra, Duest also raises claims in the context of his claim of ineffective assistance of appellate counsel. As discussed therein, the claims have no merit.

is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682, 105 S.Ct. at 3383.

[10] Under the law of this circuit, a defendant seeking to establish a Brady violation must prove (1) that the government possessed evidence - which may include impeachment evidence - favorable to the defense; (2) that the defendant did not possess the evidence, and could not obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of

the proceedings would have been different. United States v. Meros, 866 F.2d 1304, 1308 (11th.Cir.), cert. denied, 493 U.S. 932, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). There is no question but that the first three of these requirements have been met in this case.[6] The question is whether, had the evidence been disclosed to the defense, a reasonable probability existed that the outcome of the proceedings would have been different. This issue presents a mixed question of law and fact, reviewable de novo. See United States v. Rivalta, 925 F.2d 596, 597-98 (2d Cir.), cert.denied, ___U.S.___, 112 S.Ct. 215, 116 L.Ed.2d 173 (1991).

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[6] The third prong of the Meros test does not require that proof of "suppression" of the alleged Brady Material be accompanied by evidence of deliberate withholding of such evidence by the State. "The Supreme Court has recognized that 'suppression' for purposes of a Brady analysis is not 'measured by the moral culpability, or the willfulness of the prosecution.'" United States v.Spagnoulo, 960 F.2d 990 (11th.Cir. 1992) (quoting United States v.Agurs, 427 U.S. 97, 110, 96 S.Ct.2392, 2400, 49 L.Ed.2d 342 (1976). Thus, although the parties dispute whether the State deliberately or inadvertently withheld the bus ticket from the defense, this dispute is of no significance for Brady purposes to the question of whether evidence was suppressed.

Duest has presented several Brady claims based on the failure of the State to furnish to the defense various witness statements that, Duest argues, could have been used to impeach the State's witnesses at trial. Although such impeachment evidence falls within the Brady rule under Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct.763, 766, 31 L.Ed.2d 104 (1972), none of the statements sought by the defense in any way raised the possibility that the outcome of the trial would have been different.

Accordingly, we reject Duest's Brady claims with respect to these statements. Duest's claim regarding the April 5 bus ticket merits more extended discussion.

Duest contends that the April 5 Trailways bus ticket served to bolster the contentions of the defense that Duest had been in Massachusetts during President's Day Weekend 1982 and through April 5, 1982, the date on which, according to the defense, Duest left Boston for Ft.Lauderdale. Duest suggests that because the prosecution focused on the credibility of Duest's alibi witnesses, the existence of the bus ticket would have enhanced the credibility of these witnesses such that a reasonable probability exists that the jury would have accepted Duest's alibi. We disagree.

As noted by the Florida Supreme Court, the prosecution presented seven witnesses who testified that Duest had been in Ft. Lauderdale on President's Day Weekend. These witnesses included a man who allegedly had sat next to Duest on the two-day bus trip from New York to Ft. Lauderdale that landed Duest in Florida on President's Day weekend, as well as women with whom Duest allegedly shared an apartment in Florida that weekend. The jury clearly believed these witnesses rather than Duest's alibi witnesses, most of whom were family members or friends. The existence of the April 5 bus ticket in no way impeaches the testimony of the prosecution's witnesses, in that the ticket indicates only that someone traveled from Boston to Ft. Lauderdale on April 5, and says nothing about

Duest's whereabouts during the President's Day Weekend.

Admittedly, the existence of the ticket serves to corroborate the testimony of Duest's parents that they put him on a Ft. Lauderdale-bound bus in Boston on April 5. None of Duest's alibi witnesses, however, testified that Duest was in Boston the entire period between February and April 1982. Thus, the existence of the bus ticket in no way contradicts the prosecution's contention, accepted by the jury, that Duest was in Ft. Lauderdale, on President's Day Weekend. At oral argument, Duest's counsel conceded that the prosecution never argued explicitly that Duest had not been in Massachusetts on April 5.

The fact that the bus ticket serves to corroborate a part of Duest's story that is not directly relevant to the crime charged does not justify a finding for Duest on the fourth prong of the Meros test. In United States v. Booz, 451 F.2d 719 (3d Cir. 1971), the Third Circuit addressed a situation similar to the one posed in this case. In Booz, the prosecution suppressed evidence in the form of statements by local townspeople corroborating the defendant's story as to his whereabouts between 9:30 AM and 10:00 AM the day of a bank robbery for which he was charged. The court found that no Brady violation occurred because the bank robbery had occurred between 8:30 AM and 9:00 AM: "[e]vents occurring later in the day...could lend no support to appellant's case." Booz, 451 F.2d t

725. Thus, even though the withheld statements in Booz served to corroborate a portion of the defendant's story, they did not corroborate the portion of the story involving the defendant's whereabouts at the time of the crime. If corroboration of events occurring an hour after commission of the crime lend no support to a defendant's case, corroboration of events occurring months after commission of a crime can have even less relevance to a defendant's case.

Finally, we note that the jury rejected alibi evidence as to Duest's whereabouts on President's Day Weekend that was more compelling than the April 5 bus ticket. The jury failed to be swayed by introduction of an auto parts store receipt from Watertown, Massachusetts, dated February 15, bearing the name of "Duest."[7] As stated by the District Court in its September 19 Order, "[u]nder Bagley, there is no reasonable probability that an April bus ticket would have convinced the jury that Duest did not commit the February murder, when the jury did not believe a hardware store owner who produced a February receipt that purportedly showed that Duest was in Massachusetts when Pope was killed." September 19 Order at 12.

Accordingly, we reject Duest's Brady claims in their entirety. Because we also reject the remainder of Duest's claims as they pertain to his conviction for first-degree murder, we affirm the district court with respect to Duest's conviction for first-degree murder.

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[7] The receipt did not include a first name. The store owner, however, testified that the defendant himself was a party to the February 15 transaction reflected on the receipt.

III. DUEST'S SENTENCE

Duest also challenges his death sentence on a number of different grounds, including those grounds identified supra as Issue II (the Johnson v. Mississippi claim relating to Duest's vacated prior conviction); Issue III (ineffective assistance of counsel at sentencing); Issue IV (to the extent the prosecutorial misstatements took place at the penalty phase of the trial); Issue V (to the extent that appellate counsel failed to raise on appeal issues arising out of the penalty phase of the trial); Issue VII (insufficient instructions at sentencing phase on "heinous, atrocious and cruel" aggravating circumstance); Issue IX (erroneous instructions regarding votes necessary for a life sentence); and Issue X (improper burden-shifting instruction at penalty phase). Because we agree with Duest that resentencing is appropriate on the ground raised in Issue II, we need not reach the other issues raised by Duest pertaining to his sentence.

Duest's Johnson v. Mississippi Claim (Issue II)

As noted supra, Duest contends that because the sentencing jury's recommendation of death was based upon consideration of a criminal conviction that was later vacated by the Massachusetts courts, resentencing is in order under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Two questions must be answered in order to decide Duest's claim. First, did the sentencing jury's consideration of Duest's prior vacated conviction amount to Eighth Amendment error under Johnson? Second, if so, did the Florida Supreme Court err in concluding that the Eighth Amendment error was harmless?

A. Eighth Amendment Error

[11] In Johnson, the sentencing jury found three aggravating circumstances regarding Johnson's murder of a Mississippi highway patrolman, one of which was that Johnson had "previously been convicted of a felony involving the use or threat of violence of the person of another." [8] The sole evidence supporting this aggravating circumstance

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[8] Mississippi, like Florida, is a "weighing" state. See note 1, supra.

was an authenticated copy of petitioner's commitment following his 1963 conviction in New York State for second-degree assault with intent to commit first-degree rape. The prosecutor repeatedly referred to this conviction during sentencing. Because the three aggravating circumstances outweighed the mitigating circumstances, the Mississippi jury, the sentencer under Mississippi law, sentenced Johnson to death. In 1987, after the Mississippi jury passed its sentence, the New York Court of Appeals reversed Johnson's conviction for second-degree assault with intent to commit first-degree rape on the grounds that Johnson's confession was coerced.[9]

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[9] The reasons for the 24-year delay between Johnson's New York conviction and the New York Court of Appeals' reversal are irrelevant to the issue before us.

Despite the sentencing jury's consideration of this invalid conviction, the Mississippi Supreme Court affirmed Johnson's death sentence.

The United States Supreme Court reversed and remanded the case to the state courts for resentencing. The Court held that the sentencing jury's consideration of the invalid conviction violated the Eighth Amendment because the decision to sentence Johnson to death was predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Johnson,486 U.S. at 585, 108 S.Ct. at 1986 (quoting Zant v. Stephens, 462 U.S. 862; 884-85, 887 n. 24, 103 S.Ct. 2733, 2747, 2748 n. 24, 77 L.Ed.2d 235 (1983).

Thus, Johnson stands for the proposition that a sentencing jury's consideration of a vacated conviction in establishing aggravating factors violates the Eighth Amendment because such consideration undermines the "need for reliability in the determination that death is the appropriate punishment." Id. at 584, 108 S.Ct. at 1986 (citations omitted). In assessing Duest's Johnson claim, the Florida Supreme Court implicitly recognized the existence of an Eighth Amendment violation. Duest v. Dugger, 555 So.2d at 851. The State does no dispute the existence of Constitutional error in this case.

B. Harmless Error

[12-14] Before examining whether the Eighth Amendment error in this case was harmless, we note that federal courts

are not bound by state court determinations as to whether Constitutional error is harmless. Jackson v. Dugger, 931 F.2d 712, 717 (11th.Cir.), cert. denied sub nom. Singletary v. Jackson, ___U.S.___, 112 S.Ct. 452, 116 L.Ed.2d 470 (1991). Whether such error rises to the level of reversible error is a mixed question of law and fact, reviewable de novo. Id.

In Johnson, the State opposed Johnson's request for resentencing, arguing that because the Mississippi Supreme Court had concluded that the death sentence returned by the jury would have stood even absent Johnson's New York conviction, such resentencing was inappropriate. The United States Supreme Court rejected this argument. First, the Court noted that the Mississippi Supreme Court had expressly refused to conduct a harmless error analysis, and that such refusal was appropriate, given that the prosecution had focused upon that aggravating factor far more than on the others. Johnson, 486 U.S. at 590 n. 8, 108 S.Ct. at 1988-89 n. 8. Second, and "more importantly," the Court noted that "the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible." Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Id. at 590, 108 S.Ct. at 1989.

As noted supra, the Florida Supreme Court rejected Duest's Johnson claim because it "believe[d] beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of [the vacated] conviction." - Duest v.Dugger, 555 So.2d t 851.[10] The Court noted that even if Duest's vacated Massachusetts conviction were not considered by the sentencing jury, (1) another conviction for armed robbery remained extant, thereby preserving the existence of the "prior crimes of violence" aggravating circumstance; and(2) three other aggravating factors existed independent of the "prior crimes of violence" factor. Id. The State, of course, agreed with the Florida Supreme Court, adding that, unlike the sentencing jury in Johnson, the sentencing jury in this case received only limited exposure to the vacated conviction: the prosecution never mentioned the conviction during the sentencing phase, and the court merely read and later re-read the indictments to the jury.

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[10] This is the proper standard by which a court measures whether a constitutional violation is harmless error. Clemons v. Mississippi,494 U.S. 738, 753, 110 S.Ct. 1441, 1451, 108 L.Ed. 2d 725 (1990); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We agree with the district court in this case that the Florida Supreme Court conducted a harmless error analysis rather than independently reweighing the aggravating and mitigating circumstances. September 19 Order at 16-17.

Notwithstanding the Florida Supreme Court's analysis, and the contentions of the State, we hold that the Eighth Amendment error resulting from the sentencing jury's consideration of Duest's vacated Massachusetts conviction was not harmless.

The Supreme Court's decisions in Johnson,. supra and Clemens v.

Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), supports our holding, and help us identify the specific reasons why the Eighth Amendment error in this case was not harmless. As noted supra, the Johnson Court stated that, had the Mississippi Supreme Court conducted a harmless error review of the sentencing jury's consideration of Johnson's vacated New York conviction, such review would have yielded a determination that the error was not harmless. First, the Court pointed out that the prosecutor's focus on the vacated conviction made the jury's reliance on that conviction especially likely. Johnson, 486 U.S.at 590 n. 8, 108 S.Ct. at 1989 n. 8. The Court in Clemons likewise concluded that where the State "repeatedly emphasized and argued the [constitutionally impermissible aggravating factor] during sentencing,...it would require a detailed explanation based on the record for us to agree that the error in giving the invalid...instruction was harmless." Clemons, 494 U.S. at 753-54, 110 S.Ct. at 1451.

Although the jury in this case received less exposure to the vacated conviction, than did the jury in Johnson, the circumstances surrounding the jury's consideration of this conviction indicate that reversible error occurred here as well. The fact that the jury requested to see the vacated convictions after having deliberated for a time suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence. It is important to note that the jury did not request additional information or instruction from the trial court on any other matter. It is unclear from the record how much time elapsed between the jury's request and its arrival at a recommendation of death; nevertheless, the fact that the entire sentencing hearing took only one day, combined with the other circumstances surrounding the jury's determination, further calls into question the reliability of the jury's recommendation. Finally, that the jury recommended death by the narrowest of margins renders its consideration of the vacated conviction especially problematic. Thus, the context in which the sentencing jury considered Duest's conviction undermines confidence in the jury's recommendation of death as much as the context in which the jury imposed death in Johnson.

The Johnson Court rejected a finding of harmless error not only because of the jury's particular exposure to Johnson's vacated conviction, but also because "the error [in Johnson] extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 486 U.S. at 590, 108 S.Ct. at 1989. The Clemmons Court reemphasized this distinction in holding that the Mississippi Supreme Court was not precluded from conducting a harmless error analysis on remand where the trial court, rather than admitting inaccurate and misleading evidence, merely had given an erroneous instruction regarding application of the "especially heinous atrocious and cruel" aggravating circumstance. Clemons, 494 U.S. at 754-55 n. 5, 110 S.Ct. at 1451 n. 5.

The Distinction drawn by the Court in Johnson and Clemons compels reversal here. Duest's sentencing jury was allowed to consider evidence that has been revealed to be materially inaccurate. Unlike the jury in Clemons, Duest's jury did not merely consider in an improper context evidence that had been admitted during the guilt phase; it considered evidence that incorrectly indicated that (1) Duest had been convicted of a crime involving violence, and that (2) the underlying conduct for which he was convicted reflected a murderous intent. The fact that Duest may have committed some of the underlying conduct alleged in the indictment- that is, the armed assault - in no way renders harmless the effects such inaccuracies may have had on the jury. The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death.

In Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987), this court stated that:

> If there remains a possibility that the constitutionally-proscribed evidence impacted on the ultimate decisional

> process of the jury, if the beneficiary of the error cannot refute that possibility beyond all reasonable doubt, constitutional errors can never be deemed harmless.

Id. at 1554 (citing *Hutchins . Wainwright*, 715 F.2d 512, 517 (11th. Cir. 1983), *cert. denied*, 465 U.S. 1071, 104 S.Ct.1427, 79 L.Ed.2d 751 (1984). It is apparent that the jury's particular focus on the vacated conviction prior to its 7-5 recommendation of death raises a serious possibility that such evidence impacted the ultimate decisional process of the jury. Under the circumstances of this case, the State cannot show beyond a reasonable doubt that the jury would have recommended death absent consideration of the vacated

Massachusetts conviction.[11] Therefore, the sentencing jury's consideration of the vacated conviction amounts to reversible error.[12]

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[11] It is equally apparent that, had the sentencing jury recommended life, the trial court would not have overridden this recommendation and sentenced Duest to death. As conceded by the prosecution, there was "plenty of nonstatutory mitigating evidence present in this case" to support a jury determination of life imprisonment in this case. Under Florida law, a sentencing court may not override a jury recommendation of life imprisonment if the jury recommendation has a reasonable basis. Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989). In this case, the nonstatutory mitigation would have furnished such a reasonable basis for a life recommendation.

[12] This case is different from Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991), cert. denied ___U.S.___,112 S.Ct. 957, 117 L.Ed.2d 124 (1992), in which this court rejected a Clemons claim on the ground that the Florida Supreme Court's harmless error review was correct. This court held that, even after the Florida Supreme Court discounted three out of seven aggravating factors on the grounds that the trial court had misapplied the statutory criteria as to those factors, four aggravating circumstances remained,

IV. CONCLUSION

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as against one mitigating circumstance, and that therefore the Florida Supreme Court's harmless error analysis was correct. Kennedy, 933 F.2d at 911-12. Even though the balance of aggravating versus mitigating factors in this case is similar to the balance in Kennedy, given that three aggravating factors and no statutory mitigating factors were found by the trial court in this case, the cases are otherwise different, and underscore the distinction made by the United States Supreme Court in Clemons and Johnson. In Kennedy the information to which the jury was exposed was not materially inaccurate; indeed, as in Clemmons, the jury in Kennedy heard no evidence at sentencing that it could not have heard at any other point in the trial. This case, like Johnson and unlike Kennedy, involved (1) the jury's exposure to materially inaccurate information, (2) in a context which rendered that information particularly harmful to the defendant. Thus, the mere fact that the aggravating circumstances predominate over mitigating factors here in irrelevant given circumstances which undermine confidence in the jury's determination that death was the appropriate sentence. Johnson, 486 U.S. at 584, 108 S.Ct. at 1986.

For the foregoing reasons, we AFFIRM Duest's conviction for first-degree murder. We REVERSE the district court's denial of a writ of habeas corpus and VACATE Duest's death sentence. We REMAND the case to the district court for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
56 Forsyth Street, NW
Atlanta, Georgia 30303

Miguel J. Cortez,
Clerk

October 7, 1992

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 90-6009 Duest v. Singletary
DC DKT NO.: 90-06045 CIV-KLR

The enclosed order has been entered on petition for rehearing.

See Rule,41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

Miguel J. Cortez, Clerk

Reply To: Joyce Pope (404) 331-2904

This order applies to both rehearings filed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-6009

LLOYD DUEST,

Petitioner-Appellant,

verses

HARRY K. SINGLETARY, Secretary.
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

(   ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

(   ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE

****

11th. Cir. R.41-1 **STAY OR RECALL OF MANDATE**

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion of rehearing en banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under 11th Cir. R.35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6045-CIV-RYSKAMP

LLOYD DUEST,

Petitioner,

v.

RICHARD L. DUGGER, Secretary
Florida Department of
Corrections,

Respondent.
_______________________/

MEMORANDUM ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Lloyd Duest filed this petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging both his conviction for first degree murder and death sentence imposed April 14, 1983. The Florida Supreme Court described Duest's crime as follows:

On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriffs was contacted. Upon arrival, the deputy sheriff found Pope on the

> bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Duest v. State, 462 So.2d 446, 448 (Fla. 1985).

After trial, the jury convicted Duest of first degree murder. The jury then voted 7-5 recommending that Duest receive the death penalty. The trial judge accepted the jury's recommendation and found the following aggravating circumstances as provided in the Florida Statutes: (1) Duest previously had been convicted of two violent felonies, armed robbery and assault with intent to commit murder, Fla. Stat. §921.141(5)(b); (2) the capital felony was committed while Duest was engaged in the commission of a robbery, Fla. Stat.

§921.141(5)(d); (3) the capital felony was committed for pecuniary gain, Fla. Stat. §921.141(5)(f); (4) the capital felony was especially heinous, atrocious, or cruel, Fla. Stat. §921.141(5)(h); (5) the capital felony was a homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, Fla. Stat. §921.141(5)(i). The trial judge considered circumstances (2) and (3) as one, because of overlapping facts and legal interpretations, finding a total of four aggravating circumstances that applied to Duest's crime. The trial judge found no mitigating circumstances and imposed a death sentence in accord with the jury's recommendation. Duest, 462 So.2d at 449 (discussing aggravating and mitigating circumstances).

On direct appeal, both Duest's conviction and sentence were affirmed by the Supreme Court of Florida. Duest, 446 So.2d 446. Duest did not file a petition for certiorari to the United States Supreme Court. Thus, his conviction became final on January 10, 1985, the date the state supreme court denied his direct appeal.

Following his direct appeal, Duest sought post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The state trial judge conducted an evidentiary hearing as to certain issues and eventually denied all relief. Duest appealed this ruling to the Supreme Court of Florida and also filed a petition for a writ of habeas corpus in that court under Fla. Stat. §79.01. The Florida Supreme Court denied all relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990).

Duest filed this petition for writ of habeas corpus on January 19, 1990. It is his first federal petition. That day, this court stayed Duest's execution. The court now considers Duest's 341-page petition, which raised the following 25 separate claims:

I. The State unconstitutionally withheld material exculpatory evidence and introduced false and misleading evidence.

II. Duest's death sentence was based on a vacated prior conviction and therefore also on misinformation of constitutional magnitude.

III. The judge and jury considered and relied on the victim's personal characteristics, the impact of the offense on the victim's family, and the prosecutor's and family members' characterizations of the offense over defense counsel's timely objection.

IV. Duest was denied his right to trial by an impartial jury when the state introduced evidence of flight and evidence of Duest's use of an alias. The evidence and argument thereon was materially and intentionally inaccurate.

V. The sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, which was improperly argued and imposed.

VI. The "cold, calculated, and premeditated" aggravating circumstance was unconstitutionally applied toDuest's case.

VII. The sentencing judge unconstitutionally refused to find mitigating circumstances clearly set out in the record.

VIII. The penalty phase jury was unconstitutionally instructed so as to shift the burden of proof to Duest and the judge used this improper standard in imposing the death penalty.

IX. The trial judge unconstitutionally asserted that sympathy and mercy toward Duest were inappropriate considerations.

X. The prosecutor and trial judge impermissibly diminished the juror's understanding of their responsibility in the sentencing phase.

XI. The introduction of nonstatutory aggravating factors caused the death penalty to be imposed arbitrarily and capriciously.

XII. Duest's death sentence rests on an unconstitutional automatic aggravating circumstance.

XIII. Duest received ineffective assistance of counsel when his attorney failed to depose a potential state's witness because of a purported conflict of interest.

XIV. The state introduced statements taken in violation of Duest's constitutional rights and Duest received ineffective assistance of counsel in failing to suppress those statements.

XV. Duest received ineffective assistance of appellate counsel on direct appeal.

XVI. The state unconstitutionally introduced evidence of "other crimes" and undermined the reliability of the jury's determinations.

XVII. Defense counsel unreasonably and prejudicially misinformed the jury regarding the requisite burden of proof for establishing an alibi.

XVIII. Duest received ineffective assistance of counsel through failure to conduct an independent investigation and present compelling mitigating circumstances at sentencing.

XIX. Duest received ineffective assistance of counsel through failure to object to or restrain inappropriate prosecutorial comments and argument and failure to argue the applicability of nonstatutory mitigation.

XX. The trial judge relied on a hearsay presentence investigation report and conducted the sentencing hearing in an unconstitutional manner, and Duest received ineffective assistance of counsel through failure to address those shortcomings.

XXI. Duest received ineffective assistance of counsel through a conflict of interest in rendering legal advice to Duest's alibi witnesses and was denied due process in that the trial judge also provided legal advice and the state threatened these witnesses.

XXII. Insufficient evidence existed to convince a rational trier of fact that Duest was guilty of premeditated murder beyond a reasonable doubt.

XXIII. Florida imposes the death penalty based on impermissible, arbitrary, and discriminatory factors, including race.

XXIV. Duest was denied a full and fair forum in state court.

XXV. The trial judge unconstitutionally gave the sentencing jury an erroneous instruction regarding the number of votes required for a recommendation of a life-sentence.

First the court considers those claims that the Florida Supreme Court determined to be procedurally barred or waived. The court then considers the remaining claims in an order similar to that of the petition, although claims relating to ineffective assistance of counsel or conflict of interest are considered in the final section.

II. Claims Barred From Habeas Review Under An Adequate State Procedural Bar (Claims IV, VI, VII, XII, XVI)

The Florida Supreme Court found that five of Duest's claims were procedurally barred for failure to raise them on direct appeal and eleven were waived by his failure to properly present them in his appellate brief.

Generally, a state procedural bar precludes federal habeas review unless the petitioner establishes cause for his default and that prejudice resulted from that default. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (contemporaneous objection rule embodied in Florida Rule of Criminal Procedure 3.190(i) barred federal habeas consideration of whether statements admitted were voluntary). Alternatively, the petitioner must demonstrate that "a fundamental miscarriage of justice" will result if the bar is applied. Murray v. Carrier, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397, 413 (1986) (quoting Engle v. Isaac, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982)). The cause and prejudice test also applies to procedural defaults during state collateral proceedings. Presnell v. Kemp, 835 F.2d 1567, 1580 (11th Cir. 1988) (Georgia successive petition rule), cert. denied, ___U.S.__, 109 S.Ct. 882, 102 L.Ed.2d 1004 (1989).

However, a procedural bar precludes federal review only if its constitutes an "adequate and independent state ground" for deciding the claim. Harris v. Reed, 489 U.S. 255, ___, 109 S.Ct. 1038, 1041-42, 103 L.Ed.2d 308, 315-16 (1989). Under Harris, whether a state court decision rests on an adequate and independent state ground for purposes of federal habeas review is subject to the "plain statement" rule of Michigan v. Long, 463 U.S. 1032, 1042 and n.7, 103 S.Ct. 3469, 3477 and n.7, 77 L.Ed.2d 1201, 1215 and n.7 (1983). Harris, 489 U.S. at ___, 109 S.Ct. at 1042, 103 L.Ed.2d at 316. Thus, a procedural bar does not preclude consideration of a federal claim on direct or habeas review unless the last state court rendering judgment 'clearly and expressly' states that its judgment is based on a state procedural bar. Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231, 238 (1985) (quoting Michigan v. Long, 463 U.S. 1032, 1041, 103 S.Ct. 3468, 3476, 77 L.Ed.2d 1201, 1214 (1983)).

A state procedural rule is inadequate if its application in a particular setting is unforeseeable or if state courts have applied it inconsistently and sporadically. Johnson v. Mississippi, 486 U.S. 578, 587, 108 S.Ct. 1982, 1987, 100 L.Ed.2d 575, 585-86 (1988); Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc) (amendment to Georgia habeas corpus statute that state court applied retroactively to bar petitioner's claim not independent and adequate state ground precluding federal review).

In this case, the Florida Supreme Court determined that eleven of Duest's claims were waived because he did not provide argument on those claims in his appellate brief but merely referred to arguments presented in his Rule 3.850 motion. Accordingly, the state argues that these eleven claims are foreclosed from federal habeas corpus review. However, the state cites no other capital case in which such a procedural bar rule has been applied and cites only one 1955 criminal case in which a similar bar was applied. In contrast, Duest has filed a motion for summary judgment detailing capital cases in which the Florida Supreme Court has considered on the merits claims in which petitioners merely referred to arguments in their Rule 3.850 motions, as did Duest.

Considering the foregoing, this court concludes that the waiver rule used by the Florida Supreme Court to dispose of eleven of Duest's claims is not a state procedural bar based on independent and adequate state grounds. Accordingly, on federal habeas review the court will consider these eleven claims, with the exception of three claims that are also procedurally barred because Duest failed to raise them on direct appeal, Claims VI, VII, and XII. This procedural bar rests on an independent and adequate state ground, as the Florida Supreme Court "has faithfully applied its rule that claims not raised on direct appeal cannot be raised on post-conviction review." Dugger v. Adams, 489 U.S. 401, 410, 109 S.Ct. 1211, 1217 n.6, 103 L.Ed.2d 435, 445 n.6 (1989); see also Smith v.

Dugger, 840 F.2d 787, 796 (11th Cir. 1988) (Florida Supreme Court consistently applies both procedural default and contemporaneous objection rules in capital cases, so as to constitute adequate procedural bars), cert. denied, ___ U.S. ___, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). Neither has Duest shown cause for or prejudice from his default sufficient to overcome the procedural bar. Accordingly, the following claims are not cognizable on federal habeas review:

1. Claim IV, determined to be procedurally barred in Duest's motion for post-conviction relief for failure to raise it on direct appeal. Duest, 555 So.2d at 851.[13]

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[13] Although this court is barred from

2. Claim VI, determined to be procedurally barred in Duest's state habeas petition for failure to raise it on direct appeal. Id. at 853.[14]

3. Claim VII, determined to be procedurally barred in Duest's state habeas petition for

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considering the substance of this claim, it will be considered infra as it relates to ineffective assistance of appellate counsel.

[14] The court rejects Duest's argument that this claim was raised on direct appeal. On direct appeal, Duest challenged the sufficiency of the evidence to establish this aggravating circumstance, not whether the aggravator is unconsitititutionally vague or was unconstitutionally applied. On direct appeal, the Florida Supreme Court rejected Duest's claim that insufficient evidence existed to establish this aggravating circumstance. Duest, 462 So.2d at 449-50. This court agrees with that conclusion.

failure to raise it on direct appeal. Id.

4. Claim XII, determined to be procedurally barred in Duest's state habeas petition for failure to raise it on direct appeal. Id.

5. Claim XVI, determined to be procedurally barred in Duest's motion for post-conviction relief for failure to raise it on direct appeal. Id. at 851.[15]

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[15] As Duest recognizes in his petition, the Florida Supreme Court also treated this issue in the context of ineffective assistance of appellate counsel, finding that appellate counsel could not be deemed ineffective because trial counsel failed to properly preserve the issue by contemporaneous objection. Duest, 555 So.2d at 852. Duest has convinced the court that counsel contemporaneously objected to the evidence and thus that the issue of ineffective assistance of appellate counsel was a viable one. The court considers this ineffectiveness claim infra.

III. The Brady Claim
(Claim I)

Duest claims that the prosecution improperly withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). To prevail on these claims, Duest must show that the evidence was "material" either to his guilt or punishment, irrespective of the prosecutor's good or bad faith. Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. "The evidence is material only if there is reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985).[16] The same materiality standard applies to the "no request," "general request." and specific request" discovery violations outlined in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Bagley, 473

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[16] This standard in Justice Blackmun's opinion, joined by Justice O'Connor, received support from a concurring opinion joined by three Justices. Taken together, the two opinions establish a majority position on the Court for the proper standard to apply to the prosecution's failure to disclose exculpatory evidence. It is the same standard used for ineffective assistance of counsel claims in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See generally, W.LaFave & J. Israel, Criminal Procedure §19.5 at 162 (Supp. 1990) (discussing different opinions in Bagley).

U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494.[17]

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[17] It is unclear how these three categories of cases will be treated following Bagley. Justice Blackmun, joined by Justice O'Connor, indicated that "the reviewing court should assess . . . the totality of the circumstances" when determining whether a Brady violation occurred. Bagley, 473 U.S. at 683, 105 S.Ct. at 3384, 87 L.Ed.2d at 494. However, Justice Blackmun recognized the particular problem represented by specific request cases: "[T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." Id., 473 U.S. at 682-83, 105 S.Ct. at 3384, 87 L.Ed.2d at 494. Justice White, in an opinion joined by Chief Justice Burger and Justice Rehnquist, stated that there was "no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case" because the materiality standard was flexible and the cases to which it applied were on an "inherently fact-bound nature." Id. at 685, 105 S.Ct. at 3385, 87 L.Ed.2d at 496. See W. LaFave v. J. Israel, supra, at 163 (following Bagley, "[e]xactly what weight will be given to the presence of a specific request remains to be seen").

A. The Bus Ticket

The first purported Brady violation concerns a bus ticket dated April 5, 1982, which reflected travel from Boston to Fort Lauderdale by an unidentified holder. Duest argues that the ticket would have supported his alibi defense that he was in Massachusetts when Pope was killed. The ticket was contained in police files along with other items belonging to Duest. The ticket surfaced during the state trial court's evidentiary hearing on Duest's motion for post-conviction relief.

The state trial court denied post-conviction relief regarding the bus ticket. On appeal, the state supreme court also denied relief. Although the state supreme court stated that an inadvertent Brady violation occurred, it ruled that Duest had failed to demonstrate under Bagley that the bus ticket would have made any difference to this defense. Duest, 555 So.2d at 850.

Under 28 U.S.C. §2254(d), this court accepts the state court's factual determination that an inadvertent Brady violation occurred. Sumner v. Mata, 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722, 731 (1981) (presumption applies to factual determinations of both state trial and appellate courts)[18]

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[18] Duest continues to dispute the finding that the prosecution's failure to disclose the ticket was inadvertent. However, the court presumes as correct the state court's factual finding that this Brady violation was inadvertent and thus need not consider Duest's argument that the state knowingly presented false and misleading evidence to the jury when it introduced testimony that a search of Trailways' records revealed Duest left no property at the bus station. Because the Florida court determined that a Brady violation occurred, this court need not consider whether the arresting officer was part of the prosecutorial team, so that his knowledge of possible

But having considered the bus ticket in light of Bagley, this court determines that no reasonable probability exists that the ticket would have been changed the outcome of Duest's case. The ticket does not show that Duest was in Massachusetts on February 15, 1982, the day Pope was killed. Whether Duest was in Massachusetts 49 days later does not aid his alibi defense, as he could have fled Florida after the murder to return again in April. No defense witness testified that Duest was in Massachusetts continuously from February until April.

Brady material would be imputed to the prosecutor. See, e.g., Stano v. Dugger, 901 F.2d 898, 906 (11th Cir. 1990) (Edmundson, J., concurring) (setting forth framework to aid district court in determining whether detective was part of prosecution team).

At most, the April ticket merely would corroborate the testimony of Duest's parents that they put him on a bus to Florida in April. No reasonable probability exists that an April bus ticket would have convinced the jury that Duest was innocent of the offense with which he was charged. At trial, the jury chose to disbelieve eleven of Duest's relatives and friends, who testified for the defense that they had seen Duest in Watertown, Massachusetts, on February 15, 1982, the date of the murder. Instead, the jury choose to believe seven prosecution witnesses who identified Duest as being in Fort Lauderdale on that date. Under Bagley, there is no reasonable possibility that an April bus ticket would have convinced the jury that Duest did not commit the February murder, when the jury did not believe a hardware store owner who produced a February receipt that purportedly showed that Duest was in Massachusetts when Pope was killed.

B. The Statements of Various Witnesses

Besides the bus ticket, Duest claims the prosecution committed discovery violations regarding the statements of various witnesses. The state trial court conducted no evidentiary hearing on these claims and Duest requests one in this court. Because the court concludes that Duest is not entitled to relief even if the facts he alleges are true, this court determines that these claims are without merit and that Duest is entitled to no evidentiary hearing. *Agan v. Dugger*, 835 F.2d 1337, 1338 (11th Cir. 1987), *cert. denied*, 487 U.S. 1205, 108 S.Ct. 2846, 101 L.Ed.2d 884 (1988).

1. Possible Mitigating Evidence Offered by a Jail Inmate

Duest argues that the prosecution should have disclosed to the defense the statement of jail inmate Octavius Proia. Proia told police that Duest confessed to the crime and stated that he was going to use an alibi defense. Proia also told police that Duest stated that he stabbed Pope after he and Pope got into an argument. The prosecution declined to use Proia's statement in rebuttal during a guilt phase when defense counsel stated that he would withdraw as Duest's counsel if Proia testified because of a perceived conflict of interest. Transcript at 1332-34.[19]

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[19] Proia was represented by the public

Duest argues that the information that Proia provided to police was necessary mitigating evidence for the penalty phase of his trial, even if it would have helped to establish his guilt. Under Brady the prosecution is required to disclose evidence that is "both favorable to the accused and 'material either to guilt or to punishment...'" Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. Thus, the fact that Proia's testimony would have been inculpatory does not absolve the prosecution of the duty to disclose it if that testimony were truly

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defender's office, which also represented Duest at trial. The prosecution did not list Proia as a witness, as he gave his statement to a police investigator nine days after Duest's trial began. After the prosecution declined to offer Proia's testimony in rebuttal, Duest's counsel did not contact Proia to determine the substance of his testimony. For further discussion, see infra, part XVI.A.2.

material to the sentence that Duest received.

This court finds that the purportedly mitigating evidence in Proia's statement was not sufficient to create a reasonable probability of a different result in the penalty phase of Duest's case. Proia would have presumably testified not only about the argument, but also that Duest told Proia that when he left the gay bar he intended to either kill Pope or do him bodily harm in order to rob him. Appendix to Petition for Writ of Habeas Corpus, Vol. I, #13 at 4. Proia's testimony would have included Duest's statement that he was careful not to touch anything at Pope's house and to wipe fingerprints from Pope's car. Id. Proia's testimony would also have included Duest's statement that when he left Pope was not yet dead, after being stabbed in the heart and lungs. Id. Finally, Proia's testimony would have included Duest's statement that he was concocting an alibi defense. Considering Proia's statement as a whole, its introduction would not have resulted in a different penalty for Duest.

2. Impeachment Evidence Regarding Various Witnesses

Duest also argues that he unconstitutionally was denied evidence that would have impeached the testimony of various prosecution witnesses. Such impeachment evidence is within the scope of the Brady rule under Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108, 109

(1972). Duest raised these issues on December 17, 1989, in a supplement to his motion to vacate judgment and sentence. (Claim N). On January 4-5, 1990, at the hearing before the state judge, counsel for Duest made no mention of these claims, but confined his argument to the bus ticket issue. Transcript at 228-38. Duest neither produced nor requested the production of the alleged exculpatory statements he claimed the state withheld. Counsel for Duest never asked for a hearing on these issues. This argument was raised on appeal, but the Florida Supreme Court rejected it as being without merit. Duest, 555 So.2d at 851. This court agrees with that conclusion.

This court has considered the inadvertent Brady violation of withholding the bus ticket as to its impact on the penalty phase of the case. The court finds that the omission of this evidence does not create "a reasonable doubt that did not otherwise exist"[20] with respect to the jury's decision at the guilt or the penalty phase of this case. United States v. Agurs, 427 U.S. at 104, 96 S.Ct. at 2397, 49 L.Ed.2d at 350; Chaney v. Brown, 730 F.2d 1334, 1340 (10th Cir. 1984), cert. denied, 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984).

IV. The Johnson Claim
(Claim II)

Duest argues that his case should be remanded for a new sentencing hearing under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), because one of his prior convictions was vacated after the death penalty was imposed. This prior Massachusetts conviction, for armed assault with intent to murder, constituted part of an aggravation circumstance used to impose the death penalty, as it was a prior conviction of a felony involving the use or threat of violence to a person. The vacated felony involved an incident in which Duest fired shots at two police officers who were pursuing him. Duest pled guilty to the offense, but his conviction was vacated by a Massachusetts appeals court after it determined that no evidence existed that Duest possessed the requisite specific intent to kill the pursuing officers.

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[20] Duest's request for exculpatory evidence from the state encompassed, '[a]ny evidence favorable to the Defendant which is material to the issues of guilt or punishment." Record at 1709. The court construes this to be a "general request" under Agurs.

As a threshold matter, the court must determine whether the Florida Supreme Court upheld Duest's death sentence, based in part on this vacated conviction, through a re-weighing of aggravating and mitigating circumstances or under a harmless error review. Either method is permitted under the federal Constitution. Clemons v. Mississippi, ___, U.S. ____, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). However, the method employed by the Florida Supreme Court determines whether this court can consider Duest's claim under federal question review. If the Florida Supreme Court re-weighed the aggravating and mitigating factors, Duest's claim is procedurally barred. If the Florida Supreme Court conducted a harmless error review, this court must review its decision under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The parties are diametrically opposed as to which analysis the Florida Supreme Court employs.

After considering the Florida Supreme Court's language in *Duest*, a plethora of previous Florida decisions,[21] and characterizations of the Florida Supreme Court's analysis in United States Supreme Court decisions, the court concludes that Florida conducts a harmless error review in capital cases.[22] Thus, this issue is subject to federal habeas corpus review under Chapman.

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[21] *See, e.g.*, *Freeman v. State*, 563 So.2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh [the aggravating and mitigating] circumstances"); *Hudson v. State*, 538 So.2d 829, 831 (Fla.) (It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances'), *cert. denied*, ___ U.S. ___, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); *Atkins v. State*, 497 So.2d 1200, 1203 (Fla. 1986) ("It is not this Court's function to engage in a general *de novo* re-weighing of the circumstances"); *Bates v. State*, 465 So.2d 490, 493 (Fla. 1985) ("As a reviewing court, we do not reweight the evidence . . . We have consistently held that the weighing of aggravating circumstances is the trial judge's function'); *Lucas v. State*, 417 So.2d 250, 251 (Fla. 1982) ("This Court's role

As required by Chapman, the Florida Supreme Court applied the proper "beyond a reasonable doubt" standard when conducting its harmless error analysis. Duest, 555 So.2d at 851; see Clemmons, ___ U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. First, the court

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after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'").

[22] Clemmons, ___, U.S. at ___, 110 S.Ct. at 1450, 108 L.Ed.2d at 741 (Florida Supreme Court does "not apply its harmless error analysis in an automatic and mechanical fashion") (quoting Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)).

recognized that this case is distinguishable from Johnson, because even considering the vacated conviction, Duest still had an undisturbed conviction for armed robbery. Duest, 555 So.2d at 851. Because of that remaining conviction, "a basis still existed for the aggravating circumstance of prior conviction of a violent felony." Id. (citing Bundy v. State, 538 So.2d 445 (Fla. 1989); Daugherty v. State, 533 So.2d 287 (Fla.), cert. denied, 488 U.S. 959, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988)). Further, the supreme court noted that three other valid aggravating circumstances applied to Duest's sentence and concluded that "even if we were to find that one or two of the aggravating circumstances found by the trial judge, [sic] was inapplicable, it would still be appropriate to maintain the death penalty." Id. (quoting Duest v. State, 462 So.2d at 450).

Considering the foregoing, it appears that the Florida Supreme Court concluded that it was beyond a reasonable doubt that Duest's sentence was unaffected by consideration of the prior Massachusetts conviction, which was later vacated because the aggravating circumstance of a prior conviction of a violent felony still existed and was thus properly considered in the balance of aggravating and mitigating circumstances. Under Clemons, this is a proper approach to the harmless error question. Clemons, ___, U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. In contrast to Clemons, the record supports the Florida Supreme Court's conclusion that the error in

Duest's case was harmless. Here, the state did not emphasize repeatedly and argue the conviction that was later vacated to place little emphasis on the other violent felony conviction that remained. See Clemons, ___ U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741; see also Johnson v. Mississippi, 511 So.2d 1333, 1338 (Miss. 1987) (state repeatedly argued invalidated aggravating circumstance), reversed, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Instead, the trial judge merely read both indictments to the jurors and informed them that convictions had been rendered on those indictments. Supplemental Brief at 2. Having reviewed the record, the court concludes that the consideration of the vacated conviction was harmless error that does not require remand for a new sentencing hearing.

V. Victim Impact Evidence and Prosecutorial Comment (Claim III)

Duest argues that he is entitled to habeas relief because the prosecution unconstitutionally introduced prejudicial victim impact evidence at the sentencing phase of the trial, in violation of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and South Carolina v. Gathers, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

Both Booth and Gathers espouse the principle that the introduction of victim impact evidence in capital cases violates the eighth amendment, because it allows the sentence to rely on evidence that the defendant was unaware of at the time of the crime and that did not factor into the decision to kill, and it thus unrelated to the defendant's personal responsibility and moral guilt. Gathers, ___ U.S. at ___, 109 S.Ct. at 2210, 104 L.Ed.2d at 882-83. In Booth, the Supreme Court concluded that the statutorily mandated introduction of victim impact statements and descriptions of the victim's personal characteristics during the sentencing phase of a capital case violates the eighth amendment. Booth, 482 U.S. at 509, 107 S.Ct. at 2536, 96 L.Ed.2d at 452. Although the Court in Booth disapproved of victim impact statements, it recognized that the type of information included in such statements might be relevant in certain contexts, such as if it related directly to the circumstances of the crime or would rebut an argument offered by the defendant. Id. at 507 n.10, 107 S.Ct. at 2535 n.10, 96 L.Ed.2d at 451 n.10.

In Gathers, the Court ruled that the eighth amendment was violated when, during the sentencing arguments, the prosecutor read from a religious prayer that the victim was carrying when he was killed and referred to the fact that the victim also carried with him a voter registration card. Gathers, U.S. at ___, 109 S.Ct. at 2210-11, 104 L.Ed.2d at 883. The Court rejected the state's argument that the contents of these items were relevant to the crime, although it acknowledged that the fact that these items were scattered at the crimes scene indicated that the defendant was looking for valuables to steal, and was "thus a proper subject for comment." Id.

Duest's main argument under Booth and Gathers concerns the prosecution's introduction at trial of a photograph of

Pope's dresser, on which rested a picture of purported members of Pope's family. The Florida Supreme Court rejected Duest's victim impact claim while considering an ineffective appellate assistance claim, concluding that "[t]he photograph of the dresser appears to have been relevant to the case, and the fact that a picture of persons who may have been the victim's family appeared in the photograph injected minimal victim impact evidence into the trial." Duest, 555 So.2d at 852.

This court also determines that the eighth amendment was not violated by introduction of the challenged photograph during the guilt phase of Duest's trial. The photograph of Pope's dresser was relevant on another ground; that is, to show how the room was laid out and what items were on the dresser. Furthermore, it was never established that those pictured in the photograph actually were Pope's family. Transcript at 460. The prosecutor in this case did not argue to the jury that the photograph represented Pope's family, thus arguing the contents of the evidence to show victim impact, in contrast to the prosecutor in Gathers, who argued the contents of the victim's belongings to describe him as a simpleminded religious person who was a good citizen.

Besides the photograph, Duest argues that eight amendment violations occurred when the state presented victim impact evidence to the jury and judge, in the prosecutor's closing argument at the penalty stage, and in statements from the victim's family included in the presentence investigation report that was submitted to the sentencing judge. The court rejects the state's argument that these remaining Booth claims are procedurally barred, as the Florida Supreme Court clearly rejected this claim on its merits. Duest, 555 So.2d at 851 ("We reject as without merit the following additional claim[]: . . . The judge and the jury improperly relied upon victim impact evidence").

As these victim impact claims are thus cognizable on federal habeas review, the court considers the substance of the statements to which petitioner objects. In closing argument before Duest's sentencing jury, the prosecutor stated that the victim was "a young 64" who was "[e]njoying his life." While the prosecutor acknowledged that the victim may have been a homosexual, he told the jury that he believed this would not affect their decision, because the victim "had just as much of a right to be the way he was as anybody else has to be the way they are." The prosecutor then went on to state that "[o]f course, [the victim] had a family, too." Statements of family members, specifically the victim's daughter and son, were included in the presentence investigation report given to the sentencing judge. Transcript at 1811-12.

The court concludes that neither the prosecutor's argument nor the inclusion of family statements in the presentence report constitute an eighth amendment violation within the scope of Booth and Gathers. See also Bertolotti v. Dugger, 883 F.2d 1503, 1528 (11th Cir. 1989). The prosecutor's statements describing

Pope are distinguishable from those in Gathers, because they include facts that were known to Duest when Pope was killed and were intended to discourage the jurors from treating Duest leniently because of a homophobic reaction to the circumstances of the crime. These statements differ materiality from those disallowed in Gathers and in Jackson v. Dugger, 547 So.2d 1197, 1198 (Fla. 1989) (only prosecution evidence during penalty stage was sheriff's testimony about murdered officer's good reputation among peers and impact of officer's death on peers' morale and ability to carry on duties). Similarly, the inclusion of two family members' statements in the presentence report presented only to the sentencing judge is distinguishable from the situation in Booth, in which a Maryland jury was required by statute to consider victim impact statements. As required by Florida Law, the sentencing judge delineated the aggravating and mitigating circumstances that figured into her consideration of the appropriate sentence, which did no include reference to the impact of the crime on Pope's family. The mere fact that limited victim impact statements were included in the presentence report presented to the judge, who disregarded such statements in weighing the relevant aggravating and mitigating circumstances, does not constitute a violation of the eighth amendment under Booth.

VI. "Especially Heinous, Atrocious, and Cruel" (Claim V)

Duest argues that his sentencing jury was improperly instructed on the aggravating circumstance "especially heinous, atrocious, or cruel" under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988), and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

The Supreme Court approved Florida's use of this aggravating circumstance in conjunction with a limiting instruction in Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924-25 (1976). The proper limiting instruction informs the jury that this aggravator only applies to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). In Duest's case, no limiting instruction was given. Instead, the jury was simply instructed that "[t]he crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." Transcript at 1626.

On direct appeal, Duest argued that Pope's murder was not particularly heinous, atrocious, or cruel, in effect challenging whether evidence was sufficient to establish this aggravating circumstance. The Florida Supreme Court disagreed with Duest:

> The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying.

Duest, 462 So.2d at 449. The court analogized Duest's case to Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982), in which the aggravating circumstance was applied to a death caused by one of more than ten stab wounds.

In his state habeas petition, Duest claimed to receive ineffective assistance of appellate counsel for failure to raise this claim on direct appeal. The Florida Supreme Court found appellate counsel to be adequate because trial counsel did not preserve the issue for appeal. Duest, 555 So.2d at 852.

Thus, significantly, Duest's counsel failed to make a contemporaneous objection to the failure to give a limiting instruction for this aggravator or to challenge the instruction given on direct appeal. If Duest had raised this claim as a substantive matter in his Rule 3.850 motion or in his state habeas petition, the Florida Supreme Court would have determined that it was procedurally barred. If a state court would apply a procedural bar if had been given the opportunity to do so, a federal court similarly should apply a procedural bar on habeas review. Teague v. Lane, 489 U.S. 288, ___, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334, 347-48 (1989) (plain statement rule announced in Harris v. Reed does not apply to claim not presented to state court). Accordingly, this court finds that this claim is procedurally barred from habeas review. Duest has not shown cause and prejudice or a miscarriage of justice resulting from application of this bar.

VIII. Burden-shifting at Sentencing (Claim VIII)

Duest argues that the penalty phase jury instructions impermissibly shifted the burden of persuasion to him and that the trial judge employed the same impermissible standard in imposing the death sentence. Specially, Duest objects to instructions that the jury was to determine whether the mitigation presented outweighed the aggravation, because the existence of one aggravating factor would create a presumption that the death penalty was appropriate.

The sentencing jury in Duest's case was instructed to determine "first, whether sufficient aggravating circumstances exist that would not justify the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any, "and to decide whether any aggravating circumstances had been proven beyond a reasonable doubt. Transcript at 1572, 1590. See also Transcript at 1626-27.

The court finds that these instructions mirrored the language in

Florida's capital sentencing statute. See Fla. Stat. §921.141(2)(a)(b). Florida's capital sentencing scheme, including this particular language, was approved by the Supreme Court in Proffitt v. Florida, 428 U.S. at 258, 96 S.Ct. at 2969, 49 L.Ed.2d at 926 ("directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones"). There is no merit to Duest's claim that the sentencing instructions constituted impermissible burden-shifting.

-VIII. Consideration of Sympathy at Sentencing (Claim IX)

Duest argues that the trial judge improperly instructed the jurors that they could not consider sympathy toward Duest when determining what their sentence recommendation would be, under the authority of *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

However, *Brown* does not stand for the blanket proposition that all antisympathy instructions are impermissible at sentencing. *Saffle v. Parks*, ___U.S.___, ___, 110 S.Ct. 1257, 1263, 108 L.Ed.2d 415, 428 (1990). Furthermore, if *Brown* were considered a new rule, the Supreme Court has ruled that it would not apply retroactively on collateral review. *Id*., ___U.S. at ___, 110 S.Ct. at 1263-64, 108 L.Ed.2d at 428-29. Because *Brown* was decided approximately two years after Duest's conviction became final, *Brown* is inapplicable to his case and thus this claim must fail.

IX. The Caldwell Claim (Claim X)

Duest argues that the sentencing instructions to the jury improperly diminished the jurors' sense of responsibility to his death sentence, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Following Sawyer v. Smith, ___U.S.___,110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), Duest cannot use Caldwell to attack his conviction and sentence on federal habeas corpus. In Sawyer, the Supreme Court held that Caldwell was a new rule for purposes of Teague v, Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, and thus it could not be used by federal habeas petitioners whose convictions became final before it was decided. Sawyer, ___U.S. at ___, 110 S.Ct. at 2827, 111 L.Ed.2d at 206. As

Caldwell was decided June 11, 1985, and Duest's conviction became final January 10, 1985, his Caldwell claim must fail.

X. Nonstatutory Aggravating Factors (Claim XI)

Duest argues that the death penalty was arbitrarily and capriciously imposed because the prosecution introduced evidence of nonstatutory aggravating factors, such as the fact that Duest is homosexual and never served in the military. Under Florida law, aggravating circumstances are limited to those enumerated in the statute. Fla.Stat. §921.141(5).

The Florida Supreme Court addressed this claim as one for ineffective assistance of appellate counsel, concluding that appellate counsel could not be deemed lineffective for failing to raise on appeal an issue that trial counsel had not preserved. Duest, 555 So.2d at 852.

Because this claim was not raised on direct appeal as a substantive matter, had Duest raised it in his Rule 3.850 motion or in his state habeas petition, the Florida Supreme Court would have determined that it was procedurally barred. Under these circumstances, this federal court similarly should apply a procedural bar on habeas review. Teague, 489 U.S. at ___, 109 S.Ct. at 1068-69, 103 L.Ed.2d at 347-48. Because Duest has not shown cause and prejudice regarding his procedural default, the court finds that this claim is not cognizable on federal habeas review.

XI. Sufficiency of the Evidence (Claim XXII)

Duest argues that his conviction violated due process because the evidence was insufficient to support a finding of first-degree murder under a premeditation theory, one of the two bases under which the jury could have convicted him of first degree murder.[23] This claim was considered and rejected by the Florida Supreme Court on direct appeal:

> Premeditation, like other factual circumstances, may be established by circumstantial evidence. Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be

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[23] Duest does not challenge the sufficiency of the evidence to establish felony murder, the other possible basis for the jury's conviction.

inconsistent with any reasonable hypothesis of innocence. Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct.2036, 68 L.Ed.2d 342 (1981). The record reflects that defendants had stated he gets his money by "rolling gay guys" and that he intended to do the same on the day that the victim was murdered. Defendant was seen with the victim at a gay bar immediately prior to the murder and was seen leaving the bar with the victim in the victim's car. Shortly thereafter, defendant was seen driving the victim's car alone. At that time, witnesses saw blood stains on the sleeve of his jogging suit. The victim's stolen jewelry case was also seen in the car which was being driven by

> defendant after the murder. Moreover, on the day of the murder, defendant had in his possession a s even inch knife. The cause of death in this case was multiple stab wounds. We find that there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder.

Duest, 462 So.2d at 448-449. Like the Florida Supreme Court, this court finds no merit to this claim.

XII. Race as a Factor in Sentencing (Claim XXIII).

Duest argues that Florida imposes the death penalty on the basis of impermissible, arbitrary, and discriminatory factors, including race, in violation of the eighth and fourteenth amendments. Duest devotes some 39 pages of his petition to this argument, quoting extensively from studies by Professors Gross and Mauro. This claim, based on the same studies, was rejected in McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 96 L.Ed.2d 262 (1987), which collateral counsel does not bother to cite.

XIII. Full and Fair State Court Forum (Claim XXIV)

Duest argues that he was denied a full and fair forum in state court, because the trial judge refused to disqualify herself from presiding over his Rule 3.850 proceedings. Duest argues that disqualification was required because the judge was prejudiced against him. As evidence of such prejudice, Duest points to a letter written by the trial judge in response to an inquiry from the Florida Parole and Probation Commission after Duest's direct appeal was rejected. In that letter, the trial judge stated that "Mr. Duest is still lying to the Court and still trying to thwart whatever judicial process that remain."

On appeal of denial of his Rule 3.850 motion, the Florida Supreme Court found this claim to be without merit. Duest, 555 So.2d at 851. The Florida Supreme Court's interpretation of Florida law as applied to Duest is not reviewable in a federal habeas corpus proceeding. Garcia v. Perringer, 878 F.2d 360, 362 (11th Cir. 1989). Duest has not demonstrated that he failed to receive a full, fair, and adequate hearing in state court, so as rebut the presumption of regularity given to state court proceedings on federal habeas review. 28 U.S.C. §2254(d)(6).

XV. Instruction Regarding Life Recommendation (Claim XXV)

Duest argues that his capital sentencing proceedings were robbed of any indicia of reliability when the trial judge erroneously instructed the jury that a majority had to recommend life imprisonment. The jury recommended the death penalty by a majority of 7-5.

Duest's counsel did not object to this instruction at trial and did not raise it on direct appeal. Thus, were this issue before the Florida Supreme Court, it would be procedurally barred. Under the rule of Wainwright v.Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), this clam is cognizable on federal habeas review only if Duest demonstrated cause and prejudice for his default. See Ford v. Strickland, 696

F.2d 804, 812, 822 (11th Cir.), cert. denied, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); see Engle v. Isaac, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783, 805 (1982) (challenge to jury instructions barred from federal habeas review because of petitioner's failure to comply with Ohio contemporaneous review).

Duest has not shown cause for trial counsel's failure to contemporaneously object to this instruction at trial. Furthermore, there is no evidence that Duest was prejudiced by the erroneous instruction. In the context of jury instructions, "prejudice means 'not merely that the errors at [the petitioner's] trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage.'" Ford, 696 F.2d at 822 (Godbold, J., concurring in part and dissenting in part) (quoting United States v.Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 1982) (emphasis in original)). Duest cannot show such prejudice, because he can do so more than raise the possibility that the jury might have deadlocked on the issue of death or life imprisonment. There is nothing in the record to show that the jury deadlocked at 6-6, which would have resulted in a life recommendation. Without such record evidence or a proffer from Duest, no prejudice has been shown. Henry v. Wainwright, 743 F.2d 761, 763 (11th.Cir. 1984) (although instructions at capital sentencing did not inform jurors of consequences of tie vote, no prejudice when seven jurors voted for death penalty).

XV. The Strickland Claims (Claims VIII, XI, XIII, XIV, XV, XVII, XVIII, XIX, XX, XXI)

Duest argues that he received ineffective assistance of counsel, both at trial and on direct appeal. Some of these ineffective assistance claims are raised separately and some are included within other substantive claims.

The standard for reviewing ineffective assistance claims was set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on such a claim, Duest must show that his counsel's performance was below an objective standard of reasonableness, considered from his counsel's perspective at the time of the conduct. Id. at 688-89, 104 S.Ct. at 2064-65, 80 L.Ed.2d at 694.

Duest must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. The same standard applies to both the guilt and penalty phases of a capital case. Funchess v. Wainwright, 772 F.2d 683, 688 (11th. Cir. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct.1242, 89 L.Ed.2d 349 (1986). The two components of an ineffective assistance claim need not be considered in any particular order. In fact, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice...that course should be followed." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d at 699.

Questions of ineffective assistance of counsel or of conflict of interest are mixed questions of law and fact. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700 (ineffective assistance); Cuyler v.Sullivan, 446 U.S. 335, 341, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333, 334 (1980) (conflict of interest); Lusk v. Dugger, 890 F.2d 332, 336 (11th. Cir. 1989) (ineffective assistance), cert. denied, ___U.S.___,110 S.Ct. 3297, 111 L.Ed.2d 805 (1990); Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th. Cir. 1987); (conflict of interest), cert. denied, 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 345 (1988). State court findings made in deciding such claims are subject to the deference requirement of section 2254(d), but both prongs of the Strickland inquiry are mixed questions of law and fact. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700.

The court first considers Duest's claims of ineffective assistance of trial counsel and second those claims dealing with ineffective assistance of appellate counsel.

A. Ineffective Assistance of appellate counsel.

1. Failure to Object to Impermissible Burden-Shifting During Penalty Phase (Claim VIII)

Duest argued that he received ineffective assistance because trial counsel did not object to jury instructions that impermissibly shifted the burden of proof to Duest at sentencing.

On review of Duest's state habeas petition, the Florida Supreme Court considered this issue as one involving ineffective assistance of appellate counsel. The court determined that appellate counsel could not be deemed ineffective for failing to raise a claim that trial counsel had not preserved by objection. Duest,855 So.2d at 852; see Francois v. Wainwright, 741 F.2d 1275, 1285-86 (11th. Cir. 1984) (given state procedural bar, appellate counsel could reasonably conclude on appeal that Florida Supreme Court would not address issue on merits).

In this federal habeas petition, Duest also raised this burden-shifting claim as a substantive matter, a claim that this court has rejected. Because this court has determined that no impermissible burden-shifting occurred, Duest was not prejudiced by his trial counsel's failure to object to the challenged jury instructions.

2. Failure to Pursue Possible Mitigating Evidence Because of Conflict of Interest (Claim XIII)

Duest argues that a Strickland violation occurred when trial counsel failed to depose Octavius Proia, a jail inmate from Pennsylvania who could have provided mitigating evidence at the penalty phase. Specifically, Duest argues that the failure resulted from a conflict of interest, in that the public defender's office represented both Duest and Proia.

Proia was in jail for a short time following his arrest in Florida for a probation violation, arising from an earlier forgery conviction, when he contacted the state attorney's office to provide information about Duest's case. Transcript at 1291. In a statement provided nine days after Duest's trial began, Proia stated that Duest told him he had witnesses from Massachusetts who would lie to construct his alibi defense, including an auto parts store employee who would produce a phony receipt to show Duest was in Massachusetts when Pope was murdered.

Besides this testimony, which would have been inculpatory during the guilt phase of Duest's trial, Proia also stated that Duest said he had an argument with Pope before the stabbing occurred. Appendix to Petition for Writ of Habeas Corpus, Vol. 4, Tab 13 at 3. According to Duest, if this testimony had been presented in mitigation, it would have rebutted two aggravating circumstances submitted to the jury: that the murder was cold, calculated, and premeditated; and that it was committed for pecuniary gain while in the course of a robbery.[24]

It is clear that the right to effective assistance encompasses the right to representation free from actual conflict. Lightbourne v. Dugger, 829 F.2d at 1023 (citing, inter alia, Cuyler v. Sullivan, 446 U.S. at 349, 100 S.Ct. at 1719, 64 L.Ed.2d at 347. Under the two-part test established in Cuyler, Duest must show that an actual conflict existed and that the conflict had an adverse effect on his counsel's representation. Id. at 1023. If this two-part test is met, prejudice is presumed and Duest is entitled to relief. Id.

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[24] Although pecuniary gain and commission of murder while in the course of a felony are two distinct aggravating circumstances inthe Florida statutes, the state trial court judge considered them as one circumstance when she weighed the aggravating and mitigating circumstances before she determined that death was the appropriate sentence for Duest.

The threshold question before the court is whether an actual conflict of interest existed in Duest's case. See id. ("possible, speculative or merely hypothetical conflict does not suffice"). According to Duest, both parties and the state trial court recognized that an actual conflict existed because both Duest and Proia were represented by the same public defender's office. Proia had a different assistant public defender than Duest and had not previously used the public defender's office. Transcript at 1291. Yet after the potential conflict was discovered, Proia's public defender withdrew from his case. Transcript at 1296, 1333. However, the parties disagreed as to whether that withdrawal cured the conflict. Id. Eventually, the prosecution agreed not to call Proia when defense counsel stated that he would withdraw from the case and file a motion for mistrial if Proia testified. Transcript at 1332-34.

From the foregoing, the court concludes that the parties and trial court recognized a conflict if Proia were to testify during the guilt phase of Duest's case. During the guilt phase, a potential conflict existed; however, that potentiality was prevented from ripening into an actuality when the prosecutor agreed not to put Proia on the witness stand. The potential conflict allowed Duest's counsel to block Proia's testimony, which would have irretrievably damaged Duest's alibi defense.

The fact that the parties and the trial judge recognized a conflict of interest in terms of the guilt phase does not mean that an actual conflict of interest existed in terms of sentencing. "An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing." Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). To show an actual conflict, Duest must show that his trial counsel "'made a choice between possible alternative courses of action such as eliciting (or failing to elicit) evidence helpful to [Duest] but harmful to [Proia]. If he did not make such a choice, the conflict remained hypothetical.'" United States v. Mers, 701 F.2d 1321, 1328 (11th. Cir.) (quoting Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & Criminology, 226, 232 (1977)), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 482, 78 L.Ed.2d 679 (1983).

In this case, Duest's trial counsel had no conflict of interest regarding Proia's statement for purposes of the penalty stage of the proceedings. Before the prosecutor agreed not to use Proia's testimony, he stated on the record that Proia had given a sworn statement. Transcript at 1334. Duest's counsel could have requested that statement, and the mitigating evidence therein, without having to choose between Duest and Proia's interests. Without showing that such a choice was necessary, Duest has not proved that an actual conflict of interest existed. Stevenson v. Newsome, 774 F.2d 1558, 1562 (11th. Cir. 1985), cert. denied, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

In any event, even if an actual conflict existed, Duest has failed to show that such conflict prejudiced him. Even if Proia would have provided testimony that the stabbing occurred after an argument, Proia also would have testified that Duest was relying on Massachusetts witnesses who would lie to construct his alibi defense. Had the jurors heard such testimony after the defense steadfastly maintained Duest's innocence, both counsel and Duest would have suffered serious credibility problems with the jurors and the judge, which would have made them less inclined to believe other mitigating evidence presented. Smith v. Dugger, 840 F.2d 787, 795 (11th. Cir. 1988), reh'g denied, 888 F.2d 94 (11th. Cir. 1989), cert. denied, ___U.S.___, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990).

Furthermore, Proia's testimony would have included Duest's statement on his intentions when going to the bar and the methodical manner in which he executed the stabbing, which would have supported other aggravating circumstances.

3. Failure to Suppress Duest's Statements Claim (XIV)

Duest argues that he received ineffective assistance when counsel failed to suppress testimony that improperly commented on his silence in violation of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Duest also argues that the sixth amendment was violated when the prosecution used testimony in which a witness stated that he overheard Duest tell counsel that "I never committed a murder before."

As to Duest's claim that a sheriff's detective improperly commented on his silence, the record totally refutes such a claim. Detective Feltgen interviewed Duest at the courthouse and immediately advised Duest of his Miranda rights. Transcript at 876. Duest waived these rights and gave a full statement to Feltgen which was exculpatory in nature. Transcript at 877-878. On cross-examination, defense counsel asked whether this statement was recorded, and the following transpired:

> Q. (Defense counsel): And there was no tape or anything like that going?
>
> A. (Detective Feltgen): There was no tape going at that time.
>
> Q. That's sometimes used, is it not?
>
> A. If the defendant is willing to give a taped statement, a tape is used.

Q. You didn't ask him, though, did you?

A. Yes, I did.

Q. And he said no?

A. He refused to give any type of statement.

Transcript at 893.

In the context of the questioning, it is clear that Duest refused to permit a tape recording of his statement, but he never refused to give a statement. Duest's claim of a Doyle violation considerably exceeds the reach of that decision, which dealt with a trial where the prosecutor impeached the defendant's testimony explaining the circumstances of the case with comments on the defendant's failure to tell the same story at the time of his arrest. Defense counsel in this case was probing the detective's testimony to determine if there was a tape of Duest's statement in the hope that he might find some inconsistency. This court concludes that Duest has failed to establish a Doyle violation.

With regard to the testimony of Rene Robles, who conducted the lineup identification, it appears that Duest made a voluntary statement which was not in response to any interrogation from Robles. There is nothing in the record to indicate that Duest's counsel was present at the time this remark was made. Robles testified that Duest was speaking to Robles. Accordingly, no sixth amendment violation has been established.

Since an objection by trial counsel would have been unavailing as to both incidents claimed herein, the court concludes that under Strickland guidelines, trial counsel was not ineffective for failing to object.

4. Misinformation Regarding Burden of Proof of Alibi (Claim XVII)

Duest argues that defense counsel unreasonably and prejudicially misinformed the jury as to the burden of proof on his alibi defense. During jury voir dire, defense counsel stated to prospective jurors that "we just have to raise a reasonable doubt" as to Duest's whereabouts on the day of the murder. Transcript at 366.

The Florida Supreme Court concluded that there was no merit to this claim. Duest, 555 So.2d at 851. This court agreed and concludes that Duest can show no prejudice from defense counsel's statements so as to amount to ineffective assistance. Before their deliberations, the jurors were properly instructed that the prosecution bore the burden of proving beyond a reasonable doubt each element of the offense charged. Transcript at 1518-19. The jury was presented with conflicting evidence about Duest's whereabouts on the day of the murder and there was substantial evidence that Duest was at the scene of the crime. The jury determined that this evidence showed beyond a reasonable doubt that Duest was guilty of the crime with which he was charged.

5. Failure to Conduct Independent Investigation and Present Compelling Mitigation at Penalty Phase. (Claim XVIII)

Duest argues that at sentencing, trial counsel violated the rule enunciated in Strickland by failing to conduct an independent investigation regarding possibly mitigating evidence that could have been presented at sentencing. The Florida Supreme Court dismissed this claim as without merit. Duest, 555 So.2d at 851.

Duest's attorney was required to conduct a "reasonable investigation" into possible mitigating evidence. Smith, 840 F.2d at 795. Duest claims that his trial attorney failed to conduct a reasonable investigation by not obtaining his school, hospital, and prison records, in part to present them as background documentation to the mental health experts who examined Duest before sentencing. Duest claims that such investigation and presentation would have bolstered the mitigating evidence he did present at sentencing.

The trial court conducted an evidentiary hearing on this claim wherein it was established that trial counsel did conduct an adequate investigation into the defendants' mental health, family relationships and educational background. Trial counsel was dependent upon the defendant and his family for leads as to relevant data. Trial counsel retained Dr. Patsy Cerous-Livingston to interview the defendant and to prepare a report. The information included in the report was not used at the penalty phase as trial counsel made a conscious decision to exclude it. The report would have opened the door to considerable damaging evidence that would have prejudiced the defendant. Transcript at 155, 157, 175, 176. Included in the prejudicial information was the following: the defendant committed 28 prior felonies, had prior escapes from prison, was found with a knife in prison, had homosexual tendencies, would probably escape again if given the opportunity, indicated that he never acted inappropriately in the commission of any crime, and is inclined to take what he wants rather than being able to delay gratification.

Collateral counsel for the defendant hired Dr. Patricia Fleming to interview the defendant and to examine records. She came to a somewhat different conclusion than Dr. Ceros-Livingston, but her report also included some of the same negative observations that Dr. Ceros-Livingston's report included.

This court has reviewed the entire hearing transcript on this issue and agrees with the state court judge that Duest has failed to establish his ineffective assistance of counsel claim. Counsel made strategy decisions which are protected are under Strickland.

6. Ineffective Assistance of Trial Counsel in Failure to Object to Prosecutorial Conduct and Statements (Claim XIX)

Duest argues that he received ineffective assistance when counsel failed to object to a number of comments by the prosecutor both in his opening statement and closing argument, which Duest contends denied him a fair trial.

On direct appeal, one of Duest's claims concerned whether the trial court properly denied a motion for mistrial based on alleged prosecutorial misconduct. Apparently, the Florida Supreme Court did not address this claim in denying Duest's direct appeal, except to the extent that it considered a claim that the prosecutor allegedly insulted defense counsel during cross-examination of a witness. Duest, 462 So.2d at 448. If a claim is raised on direct appeal, even if not addressed directly by the state supreme court, it is considered ruled on. Such a claim is then foreclosed from state collateral attack but available in federal habeas petition as an exhausted claim. Smith, 840 F.2d at 791. Thus, the court will treat this claim as an exhausted claim.

Duest complains about the failure of trial counsel to object to a number of remarks made by the prosecutor in his opening statement, during trial, and in closing argument. Had these comments been preserved for appeal and raised on appeal, they would have been disposed of quickly as either no error or at best harmless error. Duest has failed to establish any basis for relief from this court.

Improper prosecutorial comment is not a basis for habeas relief unless the resulting prejudice amounts to a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

7. Failure to Object to Trial reliance on Hearsay Statements

Presentence Investigation

Report, Ex Parte Communications,

and Manner of Conducting Sentencing Hearing (Claim XX)

In his federal habeas petition, Duest raises this claim both as a substantive matter and as a claim for ineffective assistance of trial counsel.

The Florida capital sentencing scheme allows presentation of hearsay evidence relevant to the crime and the defendant's character, provided the defendant has the opportunity to rebut any hearsay statement. Fla. Stat. §921.141(1); Dragovich v. State, 492 So.2d 350 (1986) (hearsay evidence that defendant had reputation as arsonist not subject to fair rebuttal and thus inadmissible in penalty phase).

Duest presents numerous unfocused allegations of impropriety in the pre-sentence investigation and at the sentencing hearing. The court has reviewed these allegations and finds them wholly without merit.

8. Conflict of Interest Regarding Duest's Alibi Witnesses (Claim XXI)

Duest argues that his alibi witnesses were intimidated by the prosecutor when he advised them in depositions that they should confer with counsel before answering questions about Duest's whereabouts in February, when Duest was an escapee from a Massachusetts prison. The prosecutor properly alerted the witnesses that it might be a crime in Massachusetts to know the whereabouts of an escaped prisoner and not reveal this knowledge to proper authorities. Defense counsel also urged the witnesses to consider the implications of their testimony.

The Florida Supreme Court rejected as without merit Duest's claim that he was denied effective assistance in this alleged conflict of interest. Duest, 855 So.2d at 851. This court also finds Duest's claim to be without merit. Both the prosecutor and Duest's attorney acted in an ethical manner. Neither gave legal advice to these witnesses. They merely alerted the witnesses to potential legal problems and urged them to obtain independent legal advice. Defense counsel's conduct did not constitute deficient performance under Strickland.

B. Ineffective Assistance of Counsel

The ineffective assistance standard for appellate counsel requires that Duest establish that counsel's failure to raise an issue on appeal was not a deliberate tactical judgment or based on a good faith evaluation of an issue's merit. Smith v. Murray, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 2666-67, 91 L.Ed.2d 434, 445 (1986); Francois v. Wainwright, 741 F.2d 1275, 1285-86 (11th Cir. 1984). If the decision to abandon the issue on appeal was deliberate, ineffective assistance may still exist by "even an isolated error of counsel . . . if that error is sufficiently egregious and prejudicial." Murray v. Carrier, 477 U.S. at 496, 106 S.Ct. at 2649, 91 L.Ed.2d at 413.

1. Failure to Raise Evidence of Flight (Claim IV)

Duest argues that appellate counsel was ineffective for failing to argue that the trial court erred in permitting, over objection, evidence that Duest tried to escape while he was in police custody. The Florida Supreme Court considered this claim in its habeas review:

> Duest was contacted by the Fort Lauderdale police on April 18, 1982, and advised that he was a suspect in the homicide. He voluntarily went to the police station for questioning. At this time, Duest was known to the police as Robert Brigida. Duest was questioned by a detective about the murder. It was then discovered that misdemeanor traffic warrants were pending in Massachusetts against Robert Brigida, and Duest was arrested on these warrants. Thereafter, when the detective momentarily left the

> room and returned, Duest was missing. He was found several hours later at a Fort Lauderdale apartment.

Duest, 555 So.2d at 852. Considering these facts, the Florida Supreme Court reached the following legal conclusion:

> Duest's appellate counsel cannot be deemed ineffective for failing to argue this point. Evidence in this case raised a reasonable inference that Duest escaped as a result of consciousness of guilt of the murder rather than the pending assachusetts charges. Consistent with the rationale of Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), the jury

> could properly infer such circumstantial evidence to be evident of guilt. The argument would have been unavailing had been raised on direct appeal.

Duest, 555 So.2d at 852.

This court determines that Strickland does not require that Duest's petition be granted because of appellate counsel's failure to argue that the trial court erred in admitting evidence of flight. As evidence of flight is circumstantial evidence of guilt in Florida under Bundy, Duest's appellate counsel could have concluded, in good faith, that the issue did not merit appeal. Thus, Duest cannot show that he was prejudiced as a result of appellate counsel's failure to raise this claim.

2. Ineffective Assistance of Counsel on Direct Appeal (Claim XV).

Duest argues that his counsel on direct appeal was ineffective in failing to raise what appears in his petition as Claims IV, VII, VIII, IX, X, XI, XII, XIV, XVI, XX, and XXV. The court addressed ineffective assistance arguments concerning Claims IV, XIV, and XX in previous subsections, concluding that Duest had not shown under prejudice under Strickland so as to prevail on these claims. This court also rejected Claims VIII, IX, X, XI, and XXV on their merits or because they present new law that does not receive retroactive application to Duest's conviction and sentence. Thus, only Duest's ineffective assistance arguments involving Claims VII, XII, and XVI remain to be considered in this final subsection.

a. Refusal of sentencing court to find mitigating circumstances (Claim VII)

Duest claims that his eighth amendment right was violated by the sentencing court's refusal to find statutory and nonstatutory mitigating circumstances which are claimed to be in the record. Duest argues that the sentencing judge failed to articulate in her sentencing order to weight given to nonstatutory mitigating circumstances. This court finds no ineffective assistance claim has been established because even if this point had been raised on direct appeal, it would not have been successful. The Florida Supreme Court has held that there is no Hitchcock violation (Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)) when the sentencing court fails to articulate the weight given to non-statutory mitigating circumstances. Harich v. State, 542 So.2d 980, 981 (Fla. 1989). The sentencing court herein found no mitigating circumstances. This finding was supported by the record in this case.

b. Death sentence resets upon automatic aggravating circumstances (Claim XII)

Duest claims that the jury may have found him guilty under Florida's felony-murder statute (§782.04(1)(a)2, Fla. Stat.) which defines a capital offense as one wherein a person is killed while the defendant is perpetrating a felony. Duest then claims that one of the aggravating circumstances found by the sentencing court was §921.141(5)(d);

"the capital felony was committed while the defendant was engaged . . . in the commission of . . . robbery . . . ." Duest then argues that if the jury found him guilty of felony murder, the application of the aggravating circumstance to the felony murder statute fails to narrow the category of those who should receive the death penalty in violation of Zant v. Stephens, 462 U.S. 862, 876, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). As previously noted, this court must review this issue under the claim of ineffective assistance of appellate counsel.

Appellate counsel's performance cannot be found deficient for failing to raise this issue on appeal. The evidence of premeditation in this case was overwhelming. Duest v. State, 462 So.2dl 446, 448-49 (Fla. 1985). Furthermore, the United States Supreme Court has held that the fact than an aggravating circumstance duplicates one of the elements of the crime does not render the sentence of death unconstitutional. Lowenfield, 484 U.S at 246, 108 S.Ct. at 555, 98 L.Ed.2d at 582-83.[25] The court rejects Duest's claim of ineffective assistance of appellate counsel on this claim.

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[25] In Lowenfield, the aggravating circumstance which duplicated one of the elements of the crime was the only aggravating circumstance. The sentencing judge in this case found four aggravating circumstances. Thus, even if the jury found Duest guilty of felony-murder as opposed to premeditated murder, only one of four aggravating circumstances would have duplicated an element of the crime.

c. Court's admission of evidence of other crimes and bad character evidence (Claim XVI)

Duest complains that the trial court admitted certain testimony over objectlion that described collateral activity of Duest consisting of "other crimes" incidents and bad character evidence. These issues were not raised on direct appeal and are not reviewed under Duest's claims of ineffective assistance of appellate counsel.

The primary testimony complained of by Duest involves an incident at a party when he used a razor blade to cut off the blouse of a 15-year old girl. Prior to the reception of this testimony by the court, counsel for Duest interposed an objection on the ground that admission of this testimony would be unduly prejudicial under §90.403, Fla. Stat. The state argued for admission on the basis that Duest's defense was that of alibi. The witness who testified to the incident identified Duest as being at the party at the time Duest claimed to be in Massachusetts. The incident was such an unusual nature that it would be easily remembered and refute the contention that the witness was in error in identifying Duest. Duest argues that the admission of this evidence violates the rules in Castro v. State, 547 So.2d 111 (Fla. 1989), but this court finds to the contrary. In Castro, the court found that the objectionable evidence" . . . lacked relevance to any material fact in issue." 547 So.2d at 115. When the evidence in question is relevant to a material fact in issue, the evidence is properly admissible under §90.404(2), Fla. Stat. See Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).

This court find that none of the claims of Duest as to ineffective assistance of appellate counsel are supported by the record in this cause.

XVI. Conclusion

For the foregoing reasons, it is hereby:

ORDERED and ADJUDGED that Duest's motion for summary judgment on the issue of procedural default, filed February 28, 1990, is GRANTED, as provided herein.

ORDERED and ADJUDGED that Duest's

petition for a writ of habeas corpus, filed January 19, 1990 is DENIED.

DONE and ORDERED in Chambers at the United States District Court, Miami, this ___ day of September, 1990.

/S/
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Larry Helm Spalding, Capital Collateral Representative
Martin J. McClain, Deputy Chief Assistant CCR
Judith J. Dougherty, Assistant CCR
Celia Terenzio, Assistant Attorney General
Sylvia H. Alonso, Assistant Attorney General

DUEST v. DUGGER

Lloyd DUEST, Petitioner

v.

Richard L. DUGGER, etc.,
Respondent

Lloyd DUEST, Appellant

v.

STATE of Florida, Appellee.

Nos. 75039, 75254.

Supreme Court of Florida

Jan. 18, 1990

Petition was filed for writ of habeas corpus and appeal was taken from an order of the Circuit Court, Broward County, Patricia Cocalis, J., denying post-conviction relief. The Supreme Court held that: (1) defendant was not entitled to a new trial; (2) defendant was not entitled to new sentencing proceeding; and (3) appellate counsel was not ineffective.

Order denying post-conviction relief affirmed, and petition for habeas corpus denied.

Shaw, J., concurred in the result only.

Barkett, J., concurred in the result.

Larry Helm Spalding, Capitol Collateral Representative, and Martin J. McClain, Deputy Chief Asst. CCR, and Judith J. Dougherty, Asst. CCR., Tallahassee, for petitioner/Appellant.

Robert Butterworth, Atty. Gen., and Celia A. Terenzio and Sylvia H. Alonso, Asst. Attys. Gen., West Palm Beach, for respondent/appellee.

PER CURIAM

This is a petition for writ of habea. corpus and an appeal from the denial of a motion for postconviction relief following an evidentiary hearing. Because the death sentence was imposed in this cas, we have jurisdiction under article V, section 3(b)(1) and (9), of the Florida Constitution. In order to give adequate consideration to the issues involved, this Court temporarily stayed Duest's impending execution. We now conclude that Duest is entitled to no relief.

Duest was convicted of first-degree murder. Pursuant to the jury's recommendation, the trial judge imposed the death penalty. This Court affirmed both the conviction and sentence. Duest v. State, 462 So.2d 446 (Fla. 1985). We described the circumstances of the crime as follows:

> On February 15, 1982, defendant was seen by itnesses carrying a knife in the waistband of his pants. Sub-sequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy Sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Id. at 448.

Motion for Postconviction Relief

[1] Duest raises numerous claims, only two of which merit discussion. Duest first contends that he is entitled to a new trial because the state failed to disclose exculpatory evidence in violation of rule 3.220 of the Florida Rules of Criminal Procedure. In order to understand Duest's argument, it must be pointed out that Duest's defense at the trial was that of alibi. A number of relatives and friends testified that they had seen him in Wateredtown, Massachusetts, on February 15, 1982, the date on which the murder was committed. At the

evidentiary hearing on the motion for postconviction relief, it was developed that among Duest's personal effects contained in the police files was a bus ticket dated April 5, 1982, reflecting travel from Boston to Fort Lauderdale. The existence of this ticket was unknown to the prosecutor and had not been disclosed to the defense as part of discovery. Duest contended that had he known of the existence of this ticket, he could have introduced it into evidence at the trial in order to corroborate the testimony of his mother and father that they put him on the bus in Boston en route to Florida on April 5, 1982.

While it appears that the state inadvertently failed to furnish the ticket to the defense, we cannot see how this would have affected the outcome of the case. At trial, seven witnesses identified Duest as being in Fort Lauderdale, on February 15, 1982, when the murder occurred. In reaching its verdict, the jury chose to believe the state's witnesses rather than the witnesses introduced by the defense concerning Duest's whereabouts on the date of the murder. Whether or not Duest traveled from Boston to Fort Lauderdale forty-nine days later was irrelevant, and the introduction of the bus ticket would have done little to enhance the credibility of Duest's parents.

[2] Further, we reject Duest's argument predicated upon Roman v. State, 528 So.2d 1169 (Fla.1988), that the effect of the nondisclosure of the bus ticket must be measured by the standard of harmless error in postconviction relief proceedings. In Roman, this Court vacated the defendant's conviction because the state had not disclosed two pretrial statements of a state witness which were inconsistent with his testimony at the trial. This witness was essential to negating the defendant's contention that he was insane by

reason of intoxication when the crime was committed. In referring to the harmless error rule in the course of rejecting the state's argument that this nondisclosure was harmless, we did not intend to create a new standard of review when discovery violations are proven in motions for postconviction relief. The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v.

Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

[3] Duest further argues that he is entitled to have a new sentencing proceedings because subsequent to the imposition of the death penalty his Massachusetts conviction for armed assault with intent to murder has been vacated. He argues that because the aggravating circumstance of prior conviction of a felony involving the use or threat of violence to the person rested in part upon this conviction his death sentence should be vacated upon the authority of Johnson v. Mississippi, 486 U.S. 578, 108

S.Ct. 1981, 100 L.Ed.2d 575 (1988), and Burr v. State, 550 So.2d 444 (Fla. 1989). However, we conclude that Johnson and Burr do not mandate vacation of Duest's death sentence. We believe beyond a reasonable doubt that Duest would still have receive a sentence of death without evidence of this conviction.

In Johnson, the Supreme Court vacated a death sentence predicated in part on the aggravating circumstance of prior conviction of a violent felony when the conviction upon which that aggravating circumstance was based was later set aside. However, in the instant case evidence was introduced that Duest had also been convicted of armed robbery. This conviction remains undisturbed. Therefore, there is still a basis for the aggravating circumstance of prior conviction of a violent felony. Bundy v. State, 538 So.2d 445 (Fla. 1989); Daugherty v. State, 533 So.2d 287 (Fla. 1988). In Burr the evidence of a collateral crime later held to be inadmissible provided much of the basis for two of the three aggravating circumstances.

Finally, it should be noted that there were three other valid aggravating circumstances applicable to Duest's sentence.

As we stated in our opinion on direct appeal, "even if we were to find that one or two of the aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty." Duest v. State, 462 So.2d at 450 (citations omitted).

We reject as without merit the following additional claims:

(1) The trial judge was in error for refusing to disqualify herself from presiding over the rule 3.850 proceeding.

(2) The judge and the jury improperly relied upon victim impact evidence.

(3) Duest was denied effective assistance of counsel by trial counsel's conflict of interest in giving advice to alibi witnesses.

(4) Trial counsel was ineffective for failing to seek to suppress statements made by Duest to law enforcement officers.

(5) The State withheld other material exculpatory evidence and introduced false and misleading evidence.

(6) Defense counsel unreasonably misinformed the jury regarding the burden of proof with respect to alibi.

(7) Duest was denied effective assistance of counsel at the sentencing phase of his trial.

[4] Duest's contention that he was denied a fair trial when the state introduced evidence of flight is procedurally barred because of the failure to raise this issue on direct appeal. The same is true with respect to the claim that the state improperly introduced evidence of other crimes and bad character.

Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

Petition for Writ of Habeas Corpus

Duest raises several points which he claims involve ineffective assistance of appellate counsel. We find that a number of these were not properly preserved for appeal by trial counsel. Therefore, appellate counsel cannot be deemed ineffective for failing to raise the following issues:

(1) The jury was improperly instructed on the specially heinous, atrocious, and cruel aggravating circumstance.

(2) Evidence of other crimes and bad character was improperly introduced by the state.

(3) The penalty phase jury instruction shifted the burden of Duest to prove that death was an inappropriate penalty.

(4) During the guilt phase the prosecutor improperly asserted that sympathy and mercy toward Duest were improper

considerations, thus affecting the jury's considerations during the penalty phase.

(5) The jury's understanding of the importance of its role was impermissibly diminished.

(6) Nonstatutory aggravating factors were introduced into the sentencing phase.

(7) Evidence of Duest's post-*Miranda* silence was improperly introduced to show lack of remorse.

(8) Duest's death sentence was based on impermissible hearsay evidence contained in the presentence investigation report.

(9) The jury was erroneously instructed that a verdict of life must be made by a majority of the jury.

[5] We also reject Duest's claim that appellate counsel was ineffective for failing to argue the prejudicial effect of a photograph of the victim's dresser upon which there was a picture of persons who may have been the victim's family. Trial counsel did object to the introduction of this photograph, and Duest complains that this was error under Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The photograph of the

dresser appears to have been relevant to the case, and the fact that a picture of persons who may have been the victim's family appeared in the photograph injected minimal victim impact evidence into the trial.

[6] Further, Duest argues that appellate counsel was ineffective for failing to contend that the trial court erred in permitting, over objection, evidence that Duest tried to escape while he was in custody of the police. Duest was contacted by the Fort Lauderdale police on April 18, 1982, and advised that he was a suspect in the homicide. He

voluntarily went to the police station for questioning. At this time, Duest was known to the police as Robert Brigida. Duest was questioned by a detective about the murder. It was then discovered that misdemeanor traffic warrants were pending in Massachusetts against Robert Brigida, and Duest was arrested on these warrants. Thereafter, when the detective momentarily left the room and returned, Duest was missing. He was found several hours later at a Fort Lauderdale apartment.

Duest appellate counsel cannot be deemed ineffective for failing to argue this point.

Evidence in this case raised a reasonable inference that Duest escaped as a result of consciousness of guilt of the murder rather than the pending Massachusetts charges. Consistent with the rationale of Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), the jury could properly infer such circumstantial evidence to be evidence of guilt. The argument would have been unavailing had it been raised on direct appeal.

Duest's claim that appellate counsel was ineffective for failing to argue that testimony relating the incident concerning

Duest's use of a razor should have been excluded is also without merit. In the context in which the evidence was presented, it may have been admissible. However, it is unnecessary for us to decide this question because even if it could be said that the evidence should have been excluded, the error would have been clearly harmless. Appellate counsel cannot be faulted for failing to argue a point which, even if correct, would amount to no more than harmless error.

Duest makes several other claims which are procedurally barred because they were not raised on direct appeal. These include the following:

(1) The trial court failed to find mitigating circumstances clearly contained in the record.

(2) Duest's death sentence rests upon an unconstitutional automatic aggravating circumstance.

(3) The aggravating circumstance of cold, calculated, and premeditated was unconstitutionally applied.

Finally, we note that Duest's claim for relief under Johnson v. Mississippi has been disposed of earlier in this opinion.

Conclusion

We affirm the order denying postconviction relief. We deny the petition for habeas corpus. We also vacate the stay of execution. No petition for rehearing shall be permitted.

It is so ordered.

EHRLICH, C.J., and OVERTON, MCDONALD, GRIMES and KOGAN, JJ., concur.

SHAW, J., concurs in result only.

BARKETT, J. concurs in result.

LLOYD DUEST, etc. Appellant,

v.

STATE OF FLORIDA, Appellee.

NO. 63,678

Supreme Court of Florida

January 10, 1985

Defendant was convicted in the Circuit Court, Broward County, Patricia W. Cocalis, J., of first-degree murder, for which the sentence of death was imposed, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) trial court did not abuse its discretion in admitting testimony of rebuttal witnesses, even though State had not disclosed them prior to trial; (2) evidence was sufficient to support conviction; and (3) evidence was sufficient to support findings on challenged aggravating circumstances.

Affirmed.

R.E. Conner, Plantation, for appellant.

Jim Smith, Atty. Gen., and Marlyn J. Altman, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Justice.

This cause is before the Court on direct appeal from a circuit court judgment adjudicating Lloyd Duest guilty of first-degree murder for which the sentence of death was imposed. This Court has jurisdiction. Art.V., §3(b)(1), Fla. Const. We affirm the conviction and sentence.

On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Defendant was tried and found guilty of first-degree murder. In accordance with the jury's advisory recommendation, the trial judge imposed the death sentence.

Defendant first argues that the trial court erred in allowing two state witnesses to testify over defense counsel's objections. Defendant claims that the state did not provide defense counsel with the names and other material information concerning two of its rebuttal witnesses until during the trial; therefore, counsel was unable to properly prepare for trial and defendant was prejudiced as a result of the non-disclosure.

[1,2] The established rule in this state is that if the state fails to disclose the identify of a witness, as mandated by Rule 3.220(a)(1)(i), Florida Rules of Criminal Procedure, then the witness cannot testify unless the court first conducts a hearing to determine whether the omission was willful or inadvertent, whether the omission was trivial or substantial, and whether the omission has prejudiced the defendant's ability to properly prepare his case. Richardson v. State, 246 So.2d 771, 775 (Fla. 1971). See also Haversham v. State, 427 So.2d 400 (Fla. 4th DCA 1983). In the instant case, there was

full disclosure as to why both state rebuttal witnesses were not thoroughly identified, including their whereabouts prior to trial. The significance of their testimony was explored as well as the impact on the defendant's ability to properly prepare for trial. Defense counsel had the opportunity to speak with both witnesses prior to their testimony and conceded at trial that there was no prejudice to the defendant other than the simple fact that the witnesses had not been fully disclosed prior to trial.

Based on the facts contained in the record, we find that the trial judge fully complied with the mandate of Richardson. There was no abuse of discretion in the decision of the trial judge to permit the two state rebuttal witnesses to testify.

Defendant next argues that his sixth amendment rights were abrogated when the prosecutor insulted defense counsel during cross-examination of a state witness. Defendant contends that such comments warranted the granting of his motion for mistrial.

[3-5] The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks. Ferguson v. State, 417 So.2d 639 (Fla. 1982). No request was made in this case. Moreover, a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230 (Fla. 1979). We believe that the comments of the prosecutor did not so prejudice the defendant. Thus, we find that the trial

judge did not abuse his discretion in denying defendant's motion for mistrial.

[6-8] Defendant further contends that there was insufficient evidence of premeditated murder to convict him as charged in the indictment. Premeditation, like other factual circumstances, may be established by circumstantial evidence. Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence. Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). The record reflects that defendant had stated he gets his money by "rolling gay guys" and that he

intended to do the same on the day that the victim was murdered. Defendant was seen with the victim at a gay bar immediately prior to the murder and was seen leaving the bar with the victim in the victim's car. Shortly thereafter, defendant was seen driving the victim's car alone. At that time, witnesses saw blood stains on the sleeve of his jogging suit. The victim's stolen jewelry case was also seen in the car which was being driven by defendant after the murder. Moreover, on the day of the murder, defendant had in his possession a seven-inch knife. The cause of death in this case was multiple stab wounds. We find that there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder.

[9] Defendant also argues that the trial court erred in allowing the introduction of a prejudicial photograph which was irrelevant to any essential issue in the case. The law is well established that admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983). No such showing has been made in this case. The photograph was relevant and any improper prejudicial impact did not outweigh its probative value. See Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 459 U.S. 882,103 S.Ct., 74 L.Ed.2d 148 (1982).

Finally, defendant objects to the trial court's findings with respect to the aggravating and mitigating circumstances. The trial court found the following aggravating circumstances: 1) The defendant had been previously convicted of armed robbery and assault with intent to commit murder, section 921.141(5)(b);2) the capital felony was committed while the defendant was engaged in the commission of a robbery, section 921.141(5)(d); 3) the capital felony was committed for pecuniary gain, section 921.141(5)(f);4) the capital felony was especially heinous, atrocious, or cruel, section 921.141(5)(h); 5) the capital felony was a homicide which was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). The trial court considered circumstances 2 and 3 as one circumstance because of overlapping facts and legal definitions. Therefore, four aggravating circumstances were applicable. As to mitigating circumstances, none were applied to this case.

[10] Defendant only challenges two of the aggravating circumstances. He asserts that the murder was not particularly heinous, atrocious or cruel. We disagree with the defendant. The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying.

This case is similar to Morgan v. State, 415 So.2d 6 (Fla. 1982), where the evidence showed that the death was caused by one or more of ten stab wounds. In this case, this Court approved the finding that the homicide was especially heinous, atrocious, or cruel. Under the totality of the circumstances and applying our previous decisions to the facts of the instant case, we find that the trial court properly applied this aggravating circumstance.

[11] Defendant also challenges the finding that the homicide was committed in a cold, calculated, and premeditated manner. In finding that this aggravating circumstance applied, the trial court found:

> Evidence adduced at trial indicated that defendant informed witness Demezio some two days prior to the murder that be brings

> homosexuals back to their apartments, beats them up, and takes their money or jewelry. Defendant on the day of the murder went to his temporary residence with the victim, went into the closet where Domezio kept a dagger and left the residence with John Pope, Jr., the victim. The dagger was later discovered missing, and John Pope, Jr., was later discovered at his home, dead. His car and jewelry box were missing.

We find that the evidence supports the finding that the homicide was committed in a cold, calculated, and premeditated manner.

In the instant case, even if we were to find that one or two of the aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty; Fleming v. State, 374 So.2d 954 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 493, 62 L.Ed.2d 414 (1979).

For the reasons expressed, we affirm the defendant's conviction and the imposition of the death sentence.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, J.J., concur.

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DOCKET NO. 92-1163

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HARRY K. SINGLETARY, JR.,

Petitioner,

vs.

LLOYD DUEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT OF APPEALS, FINDING OF HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON V. MISSISSIPPI, 486 U.S. 578, 108 S. CT. 1981, 100 L.ED.2D 575 (1988), IS CONTRARY TO THIS COURT'S PRONOUNCEMENTS IN SOCHOR V. FLORIDA, 504 U.S. __, 119 L.ED.2D 329, 112 S. CT. ___ (1992), AND GRIFFIN V. UNITED STATES, 502 U.S. ___, 116 L.ED.2D 371, 112 S.CT. 466 (1991).

In light of the concession by the State of Florida below that Johnson v. Mississippi error occurred and in light of the State's further stipulation below that the Eleventh Circuit should conduct an independent review of the question of harmlessness of the error, Mr. Duest restates the questions presented as follows:

I. IS THE STATE OF FLORIDA FREE TO RAISE BEFORE THIS COURT THE QUESTION OF WHETHER EIGHTH AMENDMENT ERROR OCCURRED UNDER JOHNSON V. MISSISSIPPI WHEN IT DID NOT CONTEST IN THE ELEVENTH CIRCUIT THE PRESENCE OF JOHNSON ERROR AT MR. DUEST'S PENALTY PHASE PROCEEDINGS.

II. WHETHER THE STATE OF FLORIDA MAY ASSERT ERROR IN THE ELEVENTH CIRCUIT'S INDEPENDENT HARMLESS ERROR ANALYSIS WHEN IT AGREED THAT THE HARMLESS ERROR ANALYSIS WAS TO BE CONDUCTED ON AN INDEPENDENT BASIS.

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OCTOBER TERM, 1992

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, **Lloyd Duest**, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Eleventh Circuit Court of Appeals in this case. That opinion is reported at 967 F.2d 472 (11th Cir. 1992).

OPINIONS BELOW

In Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), the Eleventh Circuit issued an opinion ordering sentencing relief on the basis of the violation of Johnson v. Mississippi, 486 U.S. 578 (1988), which occurred in Mr. Duest's case. The Florida Supreme Court had found a violation of Johnson occurred in Mr.

Duest's penalty phase proceedings. Duest v. Dugger, 555 So. 2d 849 (Fla. 1990). Before the Eleventh Circuit, the State had conceded that Johnson error occurred. Duest v. Singletary, 967 F.2d at 480. The only issue before the Eleventh Circuit was whether the Johnson error was harmless beyond a reasonable doubt.

As to the standard of review to be employed by the Eleventh Circuit on the issue of harmless error, Mr. Duest set forth in his Initial Brief to the Eleventh Circuit: "The state court finding that the eighth amendment error was harmless is a mixed question of law and fact subject to independent review by this Court." Initial Brief at 10. The Answer Brief submitted by the State of Florida specifically agreed with this statement: "Appellee accepts as correct appellant's statement regarding the standard of review for the Brady claim and the Johnson v. Mississippi claim." Answer Brief at 4. Since the parties agreed that the Eleventh Circuit must conduct an independent review, the Eleventh Circuit conducted an independent review. It then concluded that the error was not harmless beyond a reasonable doubt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In its petition, the State of Florida recited the eighth, tenth and fourteenth amendments as the constitutional provisions involved. Mr. Duest agrees that the eighth amendment and fourteenth amendments are involved. Mr. Duest notes that the State of Florida did not assert the tenth amendment's involvement below. Having failed to advance reliance on the tenth amendment

below, the State of Florida is precluded from raising the tenth amendment as a limitation upon the Eleventh Circuit's authority. Before the Eleventh Circuit the State of Florida specifically agreed that on independent application of a harmless-beyond-a-reasonable-doubt standard was required.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This is a habeas corpus action initiated by a Florida death-sentenced inmate. The state courts found and the State conceded eighth amendment error at Mr. Duest's penalty phase proceeding before his jury when the State introduced a prior conviction for aggravated assault with intent to murder. After asking that the prior conviction be read a second time, the jury recommended death by a vote of seven to five.[1] Subsequently, that conviction was vacated and nolle prossed because it was determined that under the applicable law Mr. Duest had not committed the crime of aggravated assault with intent to murder. At Mr. Duest's penalty phase proceeding, the only evidence presented to support this prior conviction was the fact of conviction. Before the Eleventh Circuit the State of Florida agreed that Johnson error had occurred. The parties further agreed that the Eleventh Circuit was obligated to conduct an independent review of the record to determine whether this Johnson error was harmless beyond a reasonable doubt. See Answer Brief at 4.

---

[1] Under Florida law, had one juror voting for death switched and voted for life, a life recommendation would have resulted.

In connection with this review of the record, the State erroneously sets forth in its petition: "the trial court found no mitigating evidence applied to the case." Petition at 6-7.[2] In the findings of fact issued by the sentencing judge at the time the sentence of death was imposed, the judge did not find any statutory mitigating factors applied (R. 1835). However, the order did not address non-statutory mitigation (R. 1835-36). Instead, the judge stated: "this Court after weighing the aggravating and mitigating circumstances, being of the additional opinion that no mitigating circumstances exist to outweigh the aggravating [circumstances]" (R. 1836).[3]

In post-conviction proceedings, Mr. Duest raised a claim concerning whether the sentencing judge considered the non-statutory mitigating which had been presented by Mr. Duest at trial. The State and the sentencing court responded that "plenty" of mitigation had been presented to the jury and considered by the judge at Mr. Duest's sentencing (PC R. 121). In the state post-conviction proceedings, the sentencing judge stated:

> THE COURT: The court was aware of the fact there was drug abuse.

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[2] Of course under Florida law, the question is not what the judge found but rather "whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989).

[3] This language should be compared to the language of the sentencing order at issue in Parker v. Dugger, 111 S. Ct. 731, 736 (1991)("There are no mitigating circumstances that outweigh the aggravating circumstances").

* * *

> THE COURT: I was aware of that, where the family testified during the trial.
>
> MR. McCLAIN: That was nonstatutory mitigation, that was before the jury as well, because the jury heard the testimony about the drug abuse, and I believe the father testified about taking him to Methadone treatment and so forth.
>
> THE COURT: Yes, he did.

* * *

> THE COURT: There were also factors where the mother was saying how physically ill he was as a baby and whatever else. I mean I heard all of that. I think I have to say I considered it, but I will go through all the cases again. And I remember that, because I didn't see it anywhere, but I remembered that the family testified to, beyond the presentence investigation relayed because they were there at the sentencing phase as well, and did testify at that time.
>
> So, we are talking about physical and mental and stress, and drug abuse, and prison time.

(PC R. 119-22)(emphasis added).

In its post-conviction answer brief to the Florida Supreme Court, the State conceded that "evidence of [Mr. Duest's] prior drug history, therapeutic interventions and status as a good father, husband, son and brother" were presented to the jury (Answer Brief from Denial of a Motion for Post Conviction Relief at 37). Both statutory and nonstatutory mitigating circumstances were in fact set forth in the record. In the penalty phase proceeding, the State conceded that Mr. Duest had a history of debilitating drug abuse (R. 1607). The State conceded that he had helped an inmate:

> What has he done? Well, he has done a couple of things. I stand corrected. The parents, Mr. Duest

> mentioned to you that he helped an inmate once. Consider that. Consider anything else that was brought out along that line.

(R. 1615). The prosecutor was referring to an incident in Walpole prison where Mr. Duest assisted a guard who was giving aid to an inmate who had been stabbed:

> I don't have much more to say except he has helped people in prison when he was there. He helped a guard with a prisoner that had been stabbed. He went out and him and another person took him to the hospital. The guard couldn't go into the section. He was serving time at that time. He just waited there at the hospital and he didn't escape or anything. He waited for the prisoner to go back with the guard back to prison.

(R. 1578-79). In regard to Lloyd's serious drug abuse history, his father testified:

> A I brought him to a drug clinic. I believe it was in Cambridge, Cambridge, Mass. He had another drug problem a little later and brought him - trying to bring him to another one. He couldn't get into one because they were all filled. He has got a young daughter.

(R. 1578). The State also conceded that there was testimony that Mr. Duest was a good father (R. 1615-16). The State conceded that these were mitigating factors.

The State conceded that there was evidence upon which the sentencer could find the influence of extreme mental or emotional disturbance in that Mr. Duest had a long-standing drug problem (R. 1607). There was also additional evidence in the record which would have supported the impairment factor as well as extreme disturbance in that Mr. Duest detailed a lengthy psychiatric history:

> MR. BARON: There were two other things he brought to my attention.
>
> One was concerning any psychological history. He indicated to me that he told Miss Balazik that while in Walpole and in -- what was the other prison?
>
> THE DEFENDANT: Concord. I transferred from Walpole to Concord.
>
> MR. BARON: -- he had seen a psychiatrist and been in some kind of therapy. One of them is mentioned in the PSI, I believe the Walpole one, but the Concord one is not mentioned, neither one. My understanding, none of the doctors, from what I'm told, still work within the prison or prison system, so whether or not they would have added anything is unknown at this time.
>
> THE COURT: So there is an omission of one, the Concord one. You have the Waltham one in here, right?
>
> MS. BALAZIK: Yes.
>
> MR. BARON: And the one he's been seeing within the Broward County jail is listed in there.
>
> THE DEFENDANT: I saw a psychiatrist of two years, once a week, one on one, from 1971 to 1973, and I guess three years later I was arrested for illegal possession of a firearm. My parole was violated on account of the arrest.
>
> I was sent to Walpole, did 14 months, went to trial and was found not guilty, and during that 14-month span of time, I also saw a psychiatrist.
>
> MR. BARON: In addition, he indicated that he gave Miss Balazik a number of additional places that he had worked for whatever period of time that are not included within the PSI. I don't know if it was because they were not confirmed or what the situation was.

(R. 1662-63).

Numerous additional nonstatutory mitigating factors were present in the record. Mr. Duest's father testified that his son Lloyd had been an excellent son, and that Lloyd got diplomas while in prison for counseling younger drug addicts (R. 1577).

His sister testified that he had been a good brother (R. 1582). His mother said her son, Lloyd, was lovable and compassionate, that he was a quiet boy and never a discipline problem at school (R. 1583-84). His wife testified that he had been a good husband and father (R. 1587). Mr. Duest worked on his parent's home, always gave Christmas gifts except for the time when he was on escape status, and loved his family (R. 1671). During his time in the Broward County Jail, Mr. Duest made a significant contribution to group therapy sessions:

> Mental: `Records from Walpole State Prison indicate that the subject was seen in 1971 by a prison psychologist on a one to one basis. However, no clinical diagnosis was ever made. The subject is currently in group therapy sessions in Broward County Jail. According to Psychotherapist Gary B. Lane, Lloyd contributed to the group by assisting other inmates in problem solving, bringing numerous newspapers and magazine articles to be shared by the group and actively participating verbally in group interactions. He states that his participation acted as a role model for others to do the same. As a group therapy member, Mr. Duest made a significant contribution to the effectiveness of the sessions.

(R. 1811). Mr. Duest was not known for violence and to the contrary had a reputation for respect of his family and friends, and helping others:

> Friend, Edward R. Lavache, states, "I am a Watertown firefighter and have been a friend of Lloyd Duest for over ten years During this time I have never known Lloyd to do harm to anyone. I do not believe he would ever take the life of another person. I have always known him to be a loving father and husband, he has always shown the greatest respect for his family and friends. He has always helped me whenever possible and I've never seen him turn down a friend."

(R. 1813). Mr. Duest was characterized as a good worker:

> Friend, James Pallone, states, "I would like to write this Recommendation for Lloyd Duest who I have known all my life. He has always been in good standing and shown Character with my family and his community within the last 25 years.
>
> He has worked for my [sic] for 10 years and was prompt at his job. He showed responsibility and character in his job, and always got along with his fellow workers.
>
> If there is anything I could do or testify to in his behalf please do not hesitate to contact me."

(R. 1813). In fact, the probation officer, who authored a presentence investigation that the judge considered, concluded that Mr. Duest did satisfy mitigating factor (8) in that "he does has [sic] a very supportive family, friends and members of the community in Massachusetts" (R. 1816).

The State conceded in state court that "plenty" of mitigation was presented to the jury (PC-R. 121). Under Florida law, a jury's recommendation of life is binding if there exists a reasonable basis for the recommendation in the record. Hall v. State, 541 So. 2d 1125 (Fla. 1989). A "Florida penalty phase jury is a co-sentencer under Florida law." Johnson v. Singletary, ____ So. 2d ____, No. 81,121 (Fla. January 29, 1993). As a result, the Eleventh Circuit concluded that the Eighth Amendment error which occurred before the jury that voted for death by a slim margin was not harmless beyond a reasonable doubt.[4]

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[4] The Eleventh Circuit did not address Mr. Duest's other challenges to his death sentence because of its decision to grant relief for the Johnson error. In the unlikely event that this (continued...)

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT APPLIED THE CHAPMAN V. CALIFORNIA TEST PURSUANT TO THE PARTIES' AGREEMENT THAT A DE NOVO CHAPMAN REVIEW WAS REQUIRED.

Before the Eleventh Circuit, the State conceded eighth amendment error occurred and that the Eleventh Circuit was required to conduct an independent review to determine whether the error was harmless beyond a reasonable doubt. Duest v. Singletary, 967 F.2d at 480 ("The State does not dispute the existence of Constitutional error in this case"). In fact, in the Answer Brief filed in the Eleventh Circuit by the State of Florida, it was agreed that Mr. Duest had correctly stated the standard of review as requiring an independent review of the record. The Eleventh Circuit conducted an independent review and concluded that the error was not harmless beyond a reasonable doubt:

> It is apparent that the jury's particular focus on the vacated conviction prior to its 7-5 recommendation of death raises a serious possibility that such evidence impacted the ultimate decisional process of the jury. Under the circumstances

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[4](...continued) Court were to grant certiorari review and reverse, consideration of the these remaining issues would be required. These issues include Mr. Duest's claim that his jury received instructions in violation of Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Duest's jury received the same instruction at issue in Espinosa. The state courts applied a procedural bar which the District Court ruled was inadequate. An analysis of the harmlessness of the Johnson error should include consideration of the other Eighth Amendment errors which infected the process. If certiorari review is granted, Mr. Duest argues that consideration of other Eighth Amendment error must be included in the harmless error analysis.

> of this case, the State cannot show beyond a reasonable doubt that the jury would have recommended death absent consideration of the vacated Massachusetts conviction.[11]

Duest v. Singletary, 967 F.2d at 483. Footnote 11 provided:

> 11. It is equally apparent that, had the sentencing jury recommended life, the trial court would not have overridden this recommendation and sentenced Duest to death. As conceded by the prosecution, there was "plenty of nonstatutory mitigating evidence present in this case" to support a jury determination of life imprisonment in this case. Under Florida law, a sentencing court may not override a jury recommendation of life imprisonment if the jury recommendation has a reasonable basis. *Hall v. State*, 541 So.2d 1125, 1128 (Fla.1989). In this case, the nonstatutory mitigation would have furnished such a reasonable basis for a life recommendation.

The State in its Petition to this Court now for the first time challenges the Eleventh Circuit's conclusion that Johnson error occurred ("The Circuit Court's characterization of the evidence regarding aggravated assault as materially inaccurate, is incorrect." Petition at 14). However, in its Answer Brief before the Eleventh Circuit the State captioned its argument in the following fashion: "THE SUBSEQUENT INADMISSIBILITY OF A PRIOR CONVICTION USED TO SATISFY AN AGGRAVATING FACTOR DID NOT RESULT IN AN UNCONSTITUTIONAL SENTENCE AS THERE REMAINED SUFFICIENT EVIDENCE TO SUSTAIN THE EXISTENCE OF THAT AGGRAVATING FACTOR." (Answer Brief at 12). Before the Eleventh Circuit, the State of Florida agreed that the prior conviction of aggravated assault with intent to kill was erroneously admitted at the penalty phase proceeding in violation of Johnson v. Mississippi. Since a

challenge to whether Johnson error occurred was not presented to the Eleventh Circuit, it cannot be presented to this Court in a petition seeking certiorari review. Carter v. Kentucky, 450 U.S. 288, 304 (1981).

The issue before the Eleventh Circuit was simply whether the Johnson error was harmless beyond a reasonable doubt. In the Eleventh Circuit, the State of Florida agreed that an independent review of the error's harmlessness was to be conducted by that court. The State of Florida argued that the error was harmless beyond a reasonable doubt because the aggravating factor that the evidence supported was also supported by other evidence; therefore, the aggravator still applied. The Eleventh Circuit disagreed with that analysis because the jury did not weigh circumstances in a vacuum. Under Florida law, the evidence supporting the circumstances affects the weight allotted to individual aggravating circumstances by the sentencing jury.

The jury instructions supported the Eleventh Circuit's analysis. The jury was told: "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence." (R. 1799). Thereafter, while deliberating, the jury requested to hear for a second time the prior convictions read to it. See Duest v. Singletary, 967 F.2d at 481. Only then was a seven to five death recommendation returned. Thus, the Eleventh Circuit could not conclude the error was harmless beyond a reasonable doubt.

The State of Florida argued in the Eleventh Circuit that Mr. Duest's argument "stresses the importance of the mitigating evidence and fails to discuss or challenge the strength of the aggravating factors that still remain." Answer Brief at 11. However, as explained in Stringer v. Black, 112 S. Ct. 1130 (1192), and Clemons v. Mississippi, 110 S. Ct. 1441 (1990), Eighth Amendment error in a penalty phase proceeding conducted in a weighing state requires consideration of the impact of the error on the balance struck by the scales that the jury used. The Eleventh Circuit's analysis is a straight-forward application of the harmless-beyond-a-reasonable-doubt standard. The Eleventh Circuit considered the mitigation which rested on the life side of the scale. It reached the conclusion that the removal of a piece of the evidence placed on the death side of the scale may have altered the balance that the jury found. This was particularly true in light of the jury's request to have the erroneously admitted evidence heard a second time before returning with a death recommendation, and in light of the closeness of the vote. Certainly, the State of Florida had failed to prove that the Johnson error was harmless beyond a reasonable doubt. The Eleventh Circuit's conclusion was proper.

The Eleventh Circuit's straightforward application of the harmless error standard adopted in Clemons and Stringer does not warrant certiorari review.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be denied.

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 2, 1993.

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-6009

LLOYD DUEST,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANT

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Rule 11(a)(3).

CERTIFICATE OF INTERESTED PARTIES

District Court Judge:

The Honorable Kenneth L. Ryskamp
United States District Court for the Southern District of Florida

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Petitioner/Appellant: Lloyd Duest

Respondent/Appellee: Harry K. Singletary

Decedent: John Pope

PRELIMINARY STATEMENT

References to the district court record follow the procedure authorized by this Court, i.e., "R. (Vol. #) - (Doc. #) - (Page #)." References to the appendix to the habeas corpus petition shall be cited as "App. ___." References to the trial transcript and the record on appeal of Mr. Duest's state court trial and sentencing proceedings shall be cited as "R. (Page #)." References to the evidentiary hearing transcript and the post-conviction record on appeal of Mr. Duest's state court post-conviction proceedings shall be cited as "PC R. (Page #)." Other references to specific items in the record are self-explanatory, or are otherwise explained. Record excerpts accompany this brief and are submitted herewith for the Court's review.

STATEMENT REGARDING PREFERENCE

This is an appeal from the denial of a petition for a writ of habeas corpus, pursuant to 28 U.S.C. Section 2254, by the United States District Court for the Middle District of Florida. The district court issued a certificate of probable cause to appeal. Preference in the processing and disposition of this case is based upon Rule 11, Rules of the United States Court of Appeals for the Eleventh Circuit, Appendix 1(a)(3).

REQUEST FOR ORAL ARGUMENT

Mr. Duest respectfully requests the opportunity to present oral argument pursuant to Rule 22(f)(4) of the rules of this Court, given the facts that this is a capital case, that the resolution of the issues presented will determine whether petitioner will live or die, and that a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

STATEMENT OF JURISDICTION

This is an appeal from a District Court's order denying relief on a petition for a writ of habeas corpus. Timely notice of appeal was filed. A certificate of probable cause has been granted. The Court's jurisdiction rests on 28 U.S.C. 2253.

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STATEMENT OF THE ISSUE

I. Whether the withholding of material exculpatory evidence and the introduction of false and misleading evidence violated Mr. Duest's rights under the fifth, sixth, eighth and fourteenth amendments.

II. Whether Mr. Duest's sentence of death was based upon an unconstitutionally obtained prior conviction and therefore also on misinformation of constitutional magnitude in violation of the eighth and fourteenth amendments.

III. Whether Mr. Duest was denied a meaningful and individualized capital sentencing determination due to counsel's unreasonable failure to conduct independent investigation, and failure to present compelling mitigation, in violation of the sixth, eighth and fourteenth amendments.

IV. Whether Mr. Duest was deprived of his right to effective assistance of counsel by counsel's failure to object to or attempt to restrain the prosecutor from injecting his own opinions and experience, referring to matters not in evidence, misstating evidence and testimony, and arguing non-statutory aggravating factors.

V. Whether the failure to hold an evidentiary hearing on the aspects of Mr. Duest's brady claim that the state courts summarily denied was error.

VI. Whether Lloyd Duest was deprived of his fifth, sixth, eighth, and fourteenth amendment rights because he was not provided with effective assistance of counsel on direct appeal

VII. Whether Mr. Duest's conviction violates due process of law because the evidence was insufficient to convince any rational trier of fact of his guilt beyond reasonable doubt.

VIII. Whether the sentencing jury received insufficient instructions at the penalty phase in violation of hitchcock v. Dugger.

IX. Whether Mr. Duest was denied his right to a fair trial by an impartial jury when the state introduced evidence of flight and evidence of Mr. Duest's use of an alias, in violation of the fifth, sixth, eighth and fourteenth amendments.

X. Whether trial court comments and instructions that a verdict of life imprisonment had to be rendered by a majority of the jury materially mislead the jury and created the constitutionally unacceptable risk that death may have been imposed despite factors calling for life, in violation of the eighth and fourteenth amendments.

XI. Whether Mr. Duest's sentence of death violates the fifth, sixth, eighth, and fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. Duest to prove that death was inappropriate and because the sentencing judge employed this improper standard.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 21, 1982, Mr. Duest was charged by indictment with the first degree murder of John Pope in Ft. Lauderdale, Florida. Mr. Duest was tried before a jury in March, 1983. The jury returned a guilty verdict on March 18, 1983, after deliberating "very late on a Friday night" (PC R. 179). The next day the penalty phase proceeding was conducted. The jury returned a death recommendation by a seven to five vote after asking for the judge to reread Mr. Duest's prior convictions (R. 1631). At the sentencing on April 24, 1983, Mr. Duest was sentenced to death.

The central issue at trial was whether Lloyd Duest was "Danny", the person in whose company Mr. Pope had last been seen alive. The State called witnesses who had met and partied with "Danny" during the Presidents' Day weekend in 1982 when Mr. Pope was killed. The State's witnesses acknowledged their considerable use of alcohol and illegal drugs during the brief time period that they saw and were familiar with "Danny" (R. 705). The witnesses identified Mr. Duest as being "Danny" although there were differences in his physical appearance: Lloyd Duest wore glasses; "Danny" did not. "Danny's" hair was

longer than Mr. Duest's. "Danny" may have had a moustache (R. 696, 749, 784, 958, 961).

Mr. Pope was last seen alive at about 3:00 p.m. on Monday, February 15, 1982, which was Presidents' Day. He was in Lefty's, a gay bar in Ft. Lauderdale (R. 567). He was seen leaving in the company of "Danny". Mr. Pope was also seen in a gold Camaro with "Danny" at about 3:00 p.m. at the apartment where "Danny" had left his belongings (R. 940-42). At 3:30 p.m., "Danny" was seen driving the gold Camaro alone (R. 665). At 8:00 p.m., Mr. Pope was found dead by his roommate and a neighbor (R. 522).

In his defense, Mr. Duest called numerous witnesses who testified that Mr. Duest was in Massachusetts during Presidents' Day weekend of 1982. Nancy Duest, Lloyd Duest's mother, testified she saw Lloyd in Watertown, Massachusetts on February 13th. She again saw Lloyd on March 12, 1982. She further stated that she and her husband took Lloyd to the bus station in Boston on April 5, 1982, which was when Lloyd left Massachusetts bound for Florida (R. 1192-95).

Richard Duest, Lloyd's father, testified he saw Lloyd on February 15th, while he was cleaning his van in Watertown, Massachusetts. Lloyd delivered to him auto parts and a receipt for purchases made at Suburban Auto Parts (R. 1231-36). Stephen Fralick, owner of Suburban Auto Parts, testified he knew Lloyd Duest. On February 15th, Lloyd purchased a fan belt from Mr. Fralick (R. 1947-55).

Debra Duest, Lloyd's sister, testified she saw Lloyd on

February 15th in Watertown, Massachusetts. She was having a dinner party at her house. Present were her fiance, sister, brother-in-law, and sister-in-law. Lloyd dropped by briefly, but did not have dinner with them (R. 1018-20). Paul Duest, Lloyd's brother, testified about seeing Lloyd at Debra's dinner party on February 15, 1982 (R. 1073-76). Eddie Lavache, Debra's fiance, testified he recalled seeing Lloyd at Debra's dinner party on February 15, 1982 (R. 1915-18). Nancy Kerrigan, Lloyd's other sister, testified she was present at Debra's house when Lloyd stopped by on February 15, 1982 (R. 1992-98).

Matthew and Diane Turner, friends of Lloyd, both testified that they saw Lloyd in Watertown on February 14, 1982, Valentine's Day (R. 1863-66, 1887-90). Frank Duest, Lloyd's uncle, testified he saw Lloyd on February 15, 1982, in Watertown (R. 1095-1102). Mark Duest, Lloyd's cousin and Frank's son, testified he was present with Frank when they saw Lloyd on February 15, 1982, in Watertown, Massachusetts (R. 1116-19).[1]

Deputy Feltgen, who had interrogated Mr. Duest when he was arrested April 18, 1982, testified for the State that Mr. Duest told him that he arrived in Ft. Lauderdale approximately a week before via a Trailways bus (R. 877). Deputy Feltgen further

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[1] At the state post-conviction proceedings, Mr. Duest's trial counsel testified that since Mr. Duest was an escapee at the time, police were frequently checking his family's residence for signs of Mr. Duest. Mr. Duest "was moving all around the area" which explained why his witnesses "would only see Mr. Duest for five minutes here and five minutes there on this weekend" (PC-R. 170). However, the jury did not know that Mr. Duest was an escapee at the time, and thus the State was able to argue that the testimony regarding Mr. Duest's brief "cameo" appearances was incredible.

testified that law enforcement attempted to verify whether Mr. Duest had in fact arrived a week or so before via a Trailways bus, but evidence supporting Mr. Duest's claim could not be located (R. 887-88, 895).[2]

In his closing argument, the prosecutor argued that Mrs. Duest had deliberately or otherwise confused dates, and that she and her husband had taken Lloyd to the Trailways bus station on February 12th and not April 5th. According to the prosecutor, Lloyd travelled to Florida in early February, not on April 5th, and killed Mr. Pope on February 15th (R. 1403-05).[3]

Unbeknownst to the jury that convicted Lloyd Duest was the State's possession of Mr. Duest's bus ticket issued April 5, 1982, showing travel from Boston to Ft. Lauderdale. This bus ticket was contained in a manila envelope in the Lloyd Duest file maintained by the Broward County Sheriff's Office. The manila envelope contained Lloyd Duest's personal effects. The bus ticket was not disclosed to Mr. Duest's attorneys until November, 1989, six years after Mr. Duest's trial. Duest v. Dugger, 555 So. 2d at 850.

At the penalty phase proceedings held Saturday, March 19,

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[2] However, "[a]t the evidentiary hearing on the motion for post conviction relief, it was developed that among Duest's personal effects contained in the police files was a bus ticket dated April 5, 1982, reflecting travel from Boston to Ft. Lauderdale." Duest v. Dugger, 555 So. 2d 849, 850 (Fla. 1990). This bus ticket was not disclosed to Mr. Duest's trial counsel and belied Deputy Feltgen's testimony.

[3] Again, this argument was premised on false information. The State had in its possession Mr. Duest's bus ticket reflecting travel on April 5, 1982.

1983, the State introduced two judgments and sentences from Massachusetts. The first one, State's Exhibit No. 1, indicated Mr. Duest had pled guilty to the charge of robbery. The offense occurred in 1970 when Mr. Duest "did rob and steal from the person of James Moore money of the property of First National Stores, Incorporated" (R. 1574). The second one, State's Exhibit No. 2, indicated Mr. Duest "armed with a dangerous weapon, did assault Herbert McSheehy and Les Iacopucci . . . with intent to murder them" (R. 1575).[4] The prosecutor argued that these convictions together established Mr. Duest's history of violence (R. 1592).

The defense called Lloyd's father, mother, sister and wife to testify regarding Lloyd's character and background. As the State and the trial court conceded on January 4, 1990, at the Rule 3.850 evidentiary hearing, a wealth of nonstatutory mitigation was presented to the jury. The State acknowledged, "there was plenty of nonstatutory mitigating evidence present" (PC R. 121). The sentencing judge indicated, "I mean I heard all of that. I think I have to say I considered it" (PC R. 122).

The jury was instructed to "weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations" (R. 1628). After the jury retired to deliberate on its sentencing recommendation, the jury sent word to the trial judge that it

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[4] In 1988, this conviction for attempted murder was vacated by the Massachusetts courts and nolle prossed.

wished to inspect State's Exhibits Numbers 1 and 2 which had been previously read to the jury, but not furnished to it (R. 1631). The judge then once again read the two judgments and sentences to the jury (R. 1631-32). The judge noted that for the armed assault with intent to murder Mr. Duest was sentenced to Walpole (R. 1633). This had not been disclosed previously. When the judge had finished, the jury again retired to deliberate further. Subsequently, a death recommendation was returned by a seven to five vote (R. 1633-34). Thereafter, a sentence of death was imposed.

The judgment and sentence was affirmed by the Florida Supreme Court. Duest v. State, 462 So. 2d 446 (Fla. 1985). On February 19, 1987, Mr. Duest, through the Office of the Capital Collateral Representative, filed a Rule 3.850 motion, seeking post-conviction relief. On April 16, 1987, counsel amended the motion. On December 19, 1989, having completed an inspection of the State's files and records, Mr. Duest filed a supplement to the motion. In this supplement, Mr. Duest alleged discovery violations which occurred at trial. This included Mr. Duest's claim arising from the nondisclosure of his bus ticket.

On January 4, 1990, the judge ruled that a limited evidentiary hearing would be conducted.[5] Evidence would be

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[5] At the time, Mr. Duest's case was "under warrant." Less than two weeks were left before the scheduled execution. Counsel for Mr. Duest had no notice before the January 4th hearing as to whether an evidentiary hearing would be held. When the circuit court determined an evidentiary hearing would be held, counsel was ordered to immediately begin presenting evidence.

received as to penalty phase ineffective assistance of counsel. The judge also ruled evidence would be received as to the nondisclosure of the bus ticket, one aspect of the discovery violation claim. Evidence was also received establishing that Mr. Duest's Massachusetts conviction for armed assault with intent to murder had been vacated and subsequently nolle prossed. All other claims were denied summarily. At the conclusion of the hearing, the state judge found that the evidentiary hearing claims lacked merit. The Florida Supreme Court affirmed. Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).

On January 19, 1990, Mr. Duest filed a federal habeas petition in federal district court. Thereafter, a stay of Mr. Duest's then scheduled execution was entered. On September 19, 1990, Judge Ryskamp summarily denied Mr. Duest's petition. Thereafter, a certificate of probable cause was issued, and this appeal was perfected.

The facts involved in this action are complex and are detailed more fully in the body of this brief, as they relate to the individual claims discussed herein.

STANDARD OF REVIEW

This is a habeas corpus proceeding in which the state court held a limited evidentiary hearing concerning parts of three of Mr. Duest's claims. The remaining claims were summarily denied. In federal court, Judge Ryskamp refused to hold an evidentiary hearing. The state court hearing included Mr. Duest's claim of ineffective assistance of counsel at sentencing. However, there

were no state court factfindings whatsoever on that claim. Under Townsend v. Sain, 372 U.S. 293, 315-16 (1963), "[u]nless the district judge can be reasonably certain that the state trier would have granted relief had he believed petitioner's allegations," another evidentiary hearing must be held. Thus, this Court must accept petitioner's allegations as true as to the penalty phase ineffective assistance claim and order an evidentiary hearing if the allegations "could constitute ineffective assistance." Code v. Montgomery, 725 F.2d 1316, 1321 (11th Cir. 1984).

Factfindings were made by the Florida Supreme Court concerning Mr. Duest's Brady claim regarding the undisclosed bus ticket. That Court found non-disclosure of Mr. Duest's bus ticket reflecting his travel from Boston to Ft. Lauderdale commencing April 5, 1982. The factual determinations must be presumed to be correct. Burden v. Zant, 111 S. Ct. 862 (1991). However, the question of prejudice is not one of historical fact, but rather a mixed question. See United States v. Bagley, 473 U.S. 667, 682 (1985); Strickland v. Washington, 466 U.S. 668, 698 (1984). "Issues which are mixed questions of law and fact are subject to independent review by [this Court]." Martin v. Kemp, 760 F.2d 1244, 1247 (11th Cir. 1985).

Factual findings were made by the Florida Supreme Court that Mr. Duest's prior conviction for assault with intent to murder had been vacated and nolle prossed. Accordingly, eighth amendment error was found in the jury's consideration of that

judgment and sentence. See Johnson v. Mississippi, 108 S. Ct. 1981 (1988). The state court finding that the eighth amendment error was harmless is a mixed question of law and fact subject to independent review by this Court. Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991); Brown v. Dugger, 831 F.2d 1547, 1554 (11th Cir. 1987); Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1983).

As to the remaining claims, no evidentiary development has occurred. Accordingly, the allegations in the petition must be taken as true for purposes of this appeal on the question of whether evidentiary resolutions should have been allowed by the district court. Blackledge v. Allison, 431 U.S. 63 (1977).

SUMMARY OF ARGUMENT

I. The State failed to disclose its possession of Mr. Duest's bus ticket reflecting travel from Boston to Ft. Lauderdale on April 5, 1982. Despite defense counsel's repeated efforts to uncover the existence of evidence documenting Mr. Duest's travel by bus on April 5, 1982, the bus ticket was not disclosed. The bus ticket was highly relevant to Mr. Duest's alibi defense. Mr. Duest presented eleven (11) witnesses to testify that he was in Massachusetts in February of 1982 at the time of the homicide. These witnesses testified that Mr. Duest left Massachusetts on April 5, 1982. The State countered that the defense witnesses were lying and that Mr. Duest boarded the bus on February 12, 1982, and arrived in Ft. Lauderdale in time to commit the February 15, 1982, homicide. However, the

undisclosed bus ticket corroborated the defense witnesses' testimony and Mr. Duest's statement to the police when he was arrested. The bus ticket impeached the police testimony that there was no evidence that Mr. Duest traveled from Boston to Ft. Lauderdale on April 5, 1982. As a result, the nondisclosure undermines confidence in the outcome of Mr. Duest's trial.

II. At the penalty phase of Mr. Duest's capital trial, the State introduced two (2) prior convictions in order to establish the aggravating circumstances regarding previous conviction of a crime of violence. The prior crimes were robbery and armed assault with intent to murder. The latter identified two (2) victims. The jury before returning a 7-5 death recommendation asked the judge to reread the prior convictions. In 1988, the armed assault with intent to murder was vacated and nolle prossed. As a result, the jury heard materially inaccurate evidence in violation of the eighth amendment. Because the jury was required to weigh the aggravation against the mitigation, the improper consideration of aggravation cannot be shown to be harmless beyond a reasonable doubt where the State has conceded "plenty" of mitigation was presented to the jury.

III. Mr. Duest was deprived of the effective assistance of counsel at the penalty phase. Trial counsel unreasonably failed to investigate and prepare, neglecting to obtain records regarding Mr. Duest's life, neglecting to explain the purpose of penalty phase testimony to family members or to ask questions regarding family history and the abuse Mr. Duest suffered as a

child, and neglecting to provide essential background material to a mental health expert in order to assure a professionally thorough evaluation on issues relevant to mitigation. Counsel's omissions prejudiced Mr. Duest, as the jury and judge did not hear substantial evidence from lay and expert witnesses regarding the abuse Mr. Duest endured as a child, his significant substance abuse, and the effects of imprisonment at a young age. The state circuit court held an evidentiary hearing on this claim, but make no factfindings at all. The Florida Supreme Court also made no factfindings. When the state courts make no factfindings on an evidentiary issue, the district is required to hold an evidentiary hearing. Townsend v. Sain. An evidentiary hearing and relief are proper.

IV. The prosecutor's arguments at both the guilt and penalty phases injected irrelevant, misleading, inaccurate, and inflammatory considerations into the jury's deliberations. Trial counsel ineffectively made no objections to any of these arguments. In light of the jury's difficulty in reaching a guilty verdict and its close 7-to-5 vote for death at the penalty phase, counsel's failure prejudiced Mr. Duest. An evidentiary hearing and relief are proper.

V. In addition to the Brady allegation regarding the bus ticket, Mr. Duest alleged numerous other Brady violations. Neither the state courts nor the district court allowed an evidentiary hearing on these allegations. Since the allegations are not palpably frivolous or false, an evidentiary hearing was

required in the district court.

VI. Mr. Duest was deprived of the effective assistance of counsel on direct appeal because counsel unreasonably failed to raise significant issues, to Mr. Duest's substantial prejudice.

VII. Since the evidence at trial was insufficient to establish premeditated murder, Mr. Duest's conviction violates due process.

VIII. The jury was not instructed on the limiting construction of the heinous, atrocious or cruel aggravating circumstance, and the application of this aggravator thus violates the eighth and fourteenth amendments.

IX. The erroneous admission of evidence regarding Mr. Duest's flight and use of an alias when that flight and alias were at least as likely the result of Massachusetts charges pending against Mr. Duest as they were the result of his being questioned about the homicide violated due process.

X. The trial court's erroneous comments and instructions that the jury was required to reach a majority decision at the penalty phase misinformed and misled the jury. In light of the jury's 7-to-5 death vote, it cannot be said that the error had no effect upon the outcome.

XI. The penalty phase jury instructions shifted the burden to Mr. Duest to prove that life was the appropriate sentence.

ARGUMENT I

THE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE AND THE INTRODUCTION OF FALSE AND MISLEADING EVIDENCE VIOLATED MR. DUEST'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State had in its possession Mr. Duest's bus ticket reflecting his travel from Boston to Ft. Lauderdale on April 5, 1982. This ticket corroborated the testimony of Mr. Duest's alibi witnesses. The ticket was not turned over to the defense. This evidence should have been revealed to defense counsel and presented to the jury. The failure to allow the jury to consider this evidence prevented them from rendering a reliable determination of Mr. Duest's guilt and the appropriateness of a sentence of death. Because this evidence did not reach the jury, there was a failure of the adversarial process.

This case involves a clear violation of Brady v. Maryland, 373 U.S. 83 (1963). The Florida Supreme Court determined that non-disclosure of Mr. Duest's bus ticket occurred. The question for this Court is whether a reversal of Mr. Duest's conviction is required. In other words, the question is whether the State's non-disclosure of the bus ticket prejudiced Mr. Duest.

From the moment of his arrest, Lloyd Duest maintained that he had traveled to Florida via a Trailways bus which departed Boston on April 5, 1982, almost two months after the offense. He further maintained that at the time of his arrest, he had a bus ticket in his possession. Throughout pretrial discovery, when the defense attempted to ascertain the existence of such a ticket, the State denied any knowledge of any personal property seized from Mr. Duest (Deposition of Rene Robes, July 15, 1982: "Q. And was anything of his personal property taken into evidence that you felt was important? A. Just for safekeeping"

Page 18. "Q. You don't have any other personal belongings within your custody? A. No" Page 19.

The State's circumstantial evidence case was premised upon Mr. Duest being in Ft. Lauderdale on President's Day weekend, 1982. Mr. Duest presented an alibi defense. He called eleven (11) witnesses to testify that he was in Massachusetts in February and March of 1982, and that he left Boston, Massachusetts, on April 5, 1982, via a Trailways bus bound for Florida. The State responded at trial to this evidence by calling Deputy Feltgen. He testified that law enforcement personnel attempted to verify Mr. Duest's arrival via a Trailways bus in early April of 1982, but could uncover no physical evidence to support Mr. Duest's claim (R. 887-88, 895).[6] The prosecutor in his closing argument focused upon the absence of physical evidence to support Mr. Duest's claim that he left Boston for Florida on April 5, 1982. Mr. Garfield suggested that Mr. Duest's mother had taken Mr. Duest to the bus station in early February and not on April 5 (R. 1403, 1405).

The prosecutor and the police misrepresented facts known to the State. When Mr. Duest was arrested, he did in fact have a bus ticket in his possession documenting that he had left Boston

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[6] This testimony was misleading on another score. It implied that the police had contacted the bus company and after a search, could find no evidence confirming Mr. Duest's claim. However, in fact, a deputy had simply gone to the bus station but was unable to determine which bus locker was Mr. Duest's. The deputy was thus unable to either confirm or deny Mr. Duest's statement (Deposition of Rene Robes at 17). At the post-conviction evidentiary hearing, Deputy Feltgen testified, "I do recall there was a bus ticket" (PC R. 201).

on April 5, 1982, as he contended. This bus ticket was taken from Mr. Duest at the time of his arrest and held by the Broward County Sheriff's Department. This critical evidence, which would have corroborated his alibi and the veracity of his witnesses, was never provided to the defense.

Further, at trial the State rebutted the alibi defense by presenting testimony that officers had in fact investigated whether Mr. Duest had traveled to Florida on April 5, 1982. This testimony left the judge and jury with the clear impression that the investigation had proved fruitless. Again, this was contrary to the facts known to the State. The State had in its possession the bus ticket, which established that Mr. Duest indeed had traveled to Florida on April 5, 1982.

Mr. Duest presented this claim in state court, and an evidentiary hearing was held. The Florida Supreme Court made several factual findings as to this claim:

> At the evidentiary hearing on the motion for postconviction relief, it was developed that among Duest's personal effect contained in the police files was a bus ticket dated April 5, 1982, reflecting travel from Boston to Fort Lauderdale. The existence of this ticket was unknown to the prosecutor and had not been disclosed to the defense as part of discovery. Duest contended that had he known of the existence of this ticket, he could have introduced it into evidence at the trial in order to corroborate the testimony of his mother and father that they put him on the bus in Boston en route to Florida on April 5, 1982.

Duest v. Dugger, 555 So. 2d 849, 850 (Fla. 1990). The facts set forth by the Florida Supreme Court are "determination[s] of historical fact 'presumed to be correct' for purposes of a federal habeas proceeding." Burden v. Zant, 111 S. Ct. 862, 864

(1991).

The prosecution's suppression of evidence favorable to the accused violated due process. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as occurred here renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated:

> A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. See United States v. Burroughs, 830 F.2d 1574, 1577-78 (11th Cir. 1987, cert. denied, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988). Suppressed evidence is material when "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987)(quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))(plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(in banc).

There can be little doubt that material evidence was withheld in Mr. Duest's case. The Florida Supreme Court found nondisclosure of Mr. Duest's bus ticket. Further, trial counsel testified he would have used the ticket at trial had it been disclosed: "It's certainly something I would have presented" (PC

R. 162). The undisclosed evidence was favorable to the defense. In fact defense counsel had tried repeatedly to discover what evidence the police had uncovered regarding Mr. Duest's travel by ɔus on April 5, 1982, from Boston to Ft. Lauderdale. The only question under Stano is whether the evidence was material. Material evidence is evidence of a favorable character for the defense which may have affected the outcome of the guilt-innocence and/or capital sentencing trial. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87.

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973).

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985). However, it is not the defendant's burden to show the

nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability.[7] A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here.

The bus ticket, dated April 5, 1982, would have done several things for the defense. First, it verified Mrs. Duest's testimony that she took Lloyd to the Trailways bus station in Boston on April 5, 1982, so he could catch a bus to Florida. By corroborating this portion of Mrs. Duest's testimony, it added credibility to her claim that she recalled seeing Lloyd in Massachusetts on February 13. Mrs. Duest's credibility was pivotal; without the bus ticket to corroborate her testimony, the State convinced the jury she was lying. However, the bus ticket would have established that the prosecutor was in error when he suggested that Mrs. Duest had not taken Mr. Duest to the bus on April 5, but instead on February 12.[8]

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[7] Judge Ryskamp in his order denying relief assumed that Mr. Duest had to prove the nondisclosure "[m]ore likely than not altered the outcome." Judge Ryskamp said, "the April ticket merely would corroborate the testimony of Duest's parents that they put him on a bus to Florida in April." Memorandum Order at 12. Judge Ryskamp required Mr. Duest to show that the "April bus ticket would have convinced the jury that Duest was innocent of the offense with which he was charged." Id. However, Mr. Duest needed only to have raised a reasonable doubt in the jury's mind that Mr. Duest was not guilty. Judge Ryskamp applied the wrong standard of review and thus reached an erroneous conclusion.

[8] Certainly the prosecutor's attack upon Mrs. Duest's credibility underscores the importance of her testimony. This (continued...)

In the same fashion, the bus ticket would have bolstered the testimony of Lloyd's father who had also testified regarding Lloyd's April 5 departure. Lloyd's father had also testified he saw Lloyd in Massachusetts on February 15, the day Mr. Pope was killed in Florida.

The bus ticket, which conclusively established Lloyd Duest's departure from Boston on April 5, 1982, would have greatly enhanced the credibility of Mr. Duest's parents, and Mr. Duest's original statement to the police. It constituted physical evidence that could not be impeached which established that the Duests were being truthful. The bus ticket was also evidence that Mr. Duest was in fact in Massachusetts. Though it does not conclusively prove that Mr. Duest was there on February 15, it does establish he was there in early April, which was exactly what he told Deputy Feltgen. The bus ticket increases the likelihood that Mr. Duest was in Massachusetts for the time period preceding April 5. The bus ticket was important for both its content and its corroboration of the defense witnesses.

At trial, the State ridiculed Mr. Duest's statement to the officers that he had come to Florida on a bus on April 5, 1982, and had left some personal belongings at the bus station. When asked about the bus ticket at trial, the State's witness denied any knowledge of it: "And do you recall [Mr. Duest] ever showing you any kind of bus ticket? A. No, I don't recall that." (R.

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[8](...continued)
attack was motivated by the prosecutor's fear that a credible Mr. Duest would constitute a reasonable doubt.

845).[9] The State even went so far as to present testimony that a search of the Trailways bus records revealed that Mr. Duest had not left any property at the Trailways bus station: "[T]he investigation continued and we checked out the story as far as on the Trailways bus" (R. 895); "To the best of your knowledge, were any items found in the Trailways Bus Station? A. No. They could not be located." R. 888). During closing argument, the prosecutor ridiculed Mrs. Duest's testimony and suggested that in fact, she had put Mr. Duest on the bus to Florida in February 1982 at the time the crime occurred (R. 1403, 1405). The bus ticket would have completely refuted the State's evidence and argument that there was no corroboration of Mr. Duest's April 5 departure from Massachusetts. The obvious energy expended by the State trying to attack the reliability of the April 5 testimony underscores its importance at trial. The State knew that if the jury believed that Mr. Duest left Massachusetts on April 5 then there would be a reasonable probability that the jury would not convict. Under the circumstances here, more than a reasonable probability exists that the disclosure of the bus ticket would have resulted in a different outcome. No physical evidence connected Mr. Duest to the murder. The jury's decision on guilt depended solely on its evaluation of the State's witnesses, who claimed to have seen "Danny" with the victim shortly before the victim's death and of Mr. Duest's alibi witnesses, who claimed

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[9] This testimony should be compared to the evidentiary hearing testimony of Deputy Feltgen (PC-R. 201)("I do recall there was a bus ticket").

that Mr. Duest was in Massachusetts at the time of the victim's death. The bus ticket not only would have corroborated the testimony of the alibi witnesses and enhanced those witnesses' credibility, but also would have provided unimpeachable substantive evidence on its own that Mr. Duest had not traveled to Florida until April 5. The nondisclosure of the bus ticket resulted in a failure of the adversarial process. Confidence in the outcome of the guilt and penalty phases is undermined. A new trial is required.

ARGUMENT II

MR. DUEST'S SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

There can be no dispute that the judge and jury relied on Mr. Duest's prior Massachusetts convictions to establish the "prior crime of violence" aggravating circumstance upon which his death sentence was based. Two prior convictions were submitted in order to add weight to this aggravating circumstance. The sentencing court found this aggravating circumstance, noting that there were two prior convictions:

> (B) That at the time of the crime for which the defendant is to be sentenced, he had been previously convicted of another capital offense, or of a felony involving the use or threat of violence to some person;
>
> (1) This aggravating circumstance does apply in this case as the Defendant has been convicted of Armed Robbery and Armed Assault with the Intent to Commit Murder.

(R. 1833). The Florida Supreme Court in denying post-conviction relief conceded that the consideration of the "armed assault with

intent to commit murder" was eighth amendment error. Duest v. Dugger, 555 So. 2d 849, (Fla. 1990).

The State's evidence in this regard consisted solely of copies of two convictions: one for robbery and one for armed assault with the intent to murder. As to the latter charge the judge told the jury:

> THE COURT: State's Exhibit No. 2 is a certified copy from the Commonwealth of Massachusetts. Superior Court, Department of the Trial Court. This is a conviction for armed assault to murder. The defendant pled guilty on January 13, 1971, and was sentenced to a term not exceeding ten years, nor less than five years.
>
> I will read this Indictment to you, also. It says, "Commonwealth of Massachusetts. The Superior Court. At the City of Cambridge, within and for the County of Middlesex, on the first Monday of April, in the year of our Lord one thousand nine hundred and seventy, the jurors for the Commonwealth of Massachusetts on their oath present that Lloyd Paul Duest on the 4th day of March in the year of Our Lord one thousand nine hundred and seventy, at Reading, in the County of Middlesex, aforesaid being armed with a dangerous weapon, did assault Herbert McSheehy and Leo Iacopucci," or something like that, I-A-C-O-P-U-C-C-I, "with intent to murder them against the peace of said Commonwealth and contrary to the Statute in such case and provided--"

(R. 1574-75)(emphasis added). This indictment in fact indicates that Mr. Duest attempted to murder two people.[10]

After the jury returned to deliberate regarding its sentencing recommendation, proceedings were reconvened in open court when the jury requested an opportunity to view the prior convictions:

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[10] No additional facts were given to the jury beyond those contained in the indictment. The jury simply knew that Mr. Duest while armed with a dangerous weapon, did assault two people with the intent to murder them.

> THE COURT: Ladies and gentlemen, I understand you wanted to see the criminal records. They were not published to you originally so I will read them to you again. The first one I read to you, armed robbery, Commonwealth versus Lloyd Paul Duest. I will read you the Indictment.

(R. 1631). The Court thereupon read each indictment and notice of guilty plea and sentence to the jury. Again, the jury heard the indictment indicating Mr. Duest tried to murder two people. Only after this second reading of this evidence did the jury return a death recommendation.

On June 27, 1988, Mr. Duest's conviction of armed assault with intent to murder was vacated. Commonwealth v. Duest, 26 Mass. App. Ct. 137 (1988). On October 20, 1988, the charge was nolle prossed:

> Now comes the Commonwealth and files a nolle prosequi on this indictment of armed assault with the intent to murder.

(R 1-1-40).

Mr. Duest's jury, after being instructed to weigh the aggravating circumstances against the mitigating and determine if the mitigating outweighed the aggravating, returned a seven to five death recommendation. For a different outcome to have occurred, only one of the seven jurors needed to have changed sides because of the prior armed assault with intent to murder which the jury specifically asked to have read a second time. See Preston v. State, 564 So. 2d 120 (Fla. 1990)(closeness of jury vote precluded harmlessness finding). Moreover, the State has conceded there was "plenty" of nonstatutory mitigation

presented to the judge and jury (T. 121).[11] This mitigation may well have served as a basis for a life recommendation but for the evidence of a prior "armed assault with intent to murder." See Ross v. State, 474 So. 2d 1170 (Fla. 1985)(history of drug or alcohol abuse is mitigating even if no evidence of alcohol or drug usage at the time of the homicide); Cheshire v. State, 568 So. 2d 908 (Fla. 1990)(succumbing to the frailties inherent in the human condition is mitigating); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988)("[c]hildhood trauma has been recognized as a mitigating factor"); Valle v. State, 502 So. 2d 1225 (Fla. 1987)(evidence of good conduct in prison is mitigating). It was the "possibility" that the reversed prior conviction may have resulted in a death sentence that warranted reversal in Johnson. The same possibility requires a reversal of Mr. Duest's sentence of death.

In Valle v. State, 502 So. 2d 1225 (Fla. 1987), the Florida Supreme Court stated:

> It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death.

502 So. 2d at 1226. Certainly, the introduction of materially inaccurate and false aggravation is just as likely to skew the

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[11] This mitigation included Mr. Duest's history of drug abuse, his efforts to kick the habit through Methadone treatment, Mr. Duest's history of being physical frail, his history of mental stress and his good behavior in jail where he saved a guard's life (PC R. 118-22). The State conceded "there was plenty of nonstatutory mitigating evidence present" (PC R. 121).

balancing and tip the scale in favor of a recommended sentence of death.[12] As noted in Johnson, eighth amendment error was found because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 108 S. Ct. at 1989. In Mr. Duest's case, the identical eighth amendment violation occurred.

In Mr. Duest's case, the Florida Supreme Court did not dispute that error had occurred under Johnson. As a result of this error, improper aggravating evidence was presented to the jury. This improperly admitted evidence indicated that Mr. Duest had previously tried to murder two people. Certainly, this

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[12] At the post-conviction evidentiary hearing, Mr. Duest's trial counsel testified it would have been important to delete the evidence of the prior armed assault with intent to murder:

> Q. Right. But to the extent that there were two, one's better than two.
>
> A. Oh, obviously and none's better than one.
>
> Q. And why is one better than two?
>
> A. Because it's just one less aggravating circumstance that the jury is familiar with.
>
> I also believe that if it's just one, a jury may think, well, it's that one time but two in my opinion is more than just a doubling of one to a jury. It might have some real ramifications.
>
> Q. If you were to have your preference, which one of the two would you want to get rid of, a robbery or assault with intent to murder?
>
> A. Well, considering the victim, if I recall on the assault to murder I would certainly want to get rid of that one.

(PC-R. 188-89).

evidence added weight to the aggravation side of the scale, and likely tipped the scale in favor of a death recommendation. However, the Florida Supreme Court inexplicably found the error harmless, saying, "[w]e believe beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of this conviction." Duest v. Dugger, 555 So. 2d at 851. Judge Ryskamp agreed the error was harmless because "the trial judge merely read both indictments to the jurors." Memorandum Order at 19. However, Judge Ryskamp overlooked the fact that the jury could not reach a verdict until the indictments were read for a second time. Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that the jury hearing that Mr. Duest had previously attempted to murder two people did not tip the jurors' balancing in favor of a death recommendation.

In Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990), the Supreme Court noted that Johnson v. Mississippi error was subject to the harmless error analysis set forth in Chapman v. California, 386 U.S. 18 (1967).[13] The application of the Chapman-harmless error standard is a federal question subject to

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[13] Clemons also held that a state appellate court could conduct a reweighing if state law so permitted. However, Florida law does not permit the Florida Supreme Court to conduct such a reweighing. Parker v. Dugger, 111 S. Ct. 731 (1991). Instead, the Florida Supreme Court employs the Chapman standard, as it did here, in order to determine whether the defendant's right to a jury recommendation requires a resentencing. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982)("This Court's role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition'"); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985)("As a reviewing court, we do not reweigh the evidence").

federal habeas review. Jackson v. Dugger, 931 F.2d 712, 717 (11th Cir. 1991). In Mr. Duest's case, this means the Johnson error must be measured against this Court's precedent regarding the harmless beyond a reasonable doubt standard in a Florida capital sentencing proceeding.

In Brown v. Dugger, 831 F.2d 1547, 1554 (11th Cir. 1987), this Court explained:

> The 'harmless beyond a reasonable doubt' standard, elucidated in Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), presumes prejudice and places the burden [] on the beneficiary of the errors to prove beyond a reasonable doubt that the errors did not contribute to the verdict. [Citations] If there remains a possibility that the constitutionally-proscribed evidence impacted on the ultimate decisional process of the jury, if the beneficiary of the error cannot refute that possibility beyond all reasonable doubt, constitutional errors can never be deemed harmless.

This Court applied this test in Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). There, the Florida Supreme Court had found error under Hitchcock v. Dugger, 481 U.S. 383 (1987), to be "harmless because the nonstatutory mitigating evidence was weak in comparison to the five statutory aggravating factors." 890 F.2d at 303. This Court disagreed and concluded that the error in Delap could not be found to be harmless beyond a reasonable doubt. "The presence of substantial nonstatutory mitigating evidence [] alone" was sufficient to preclude a finding of harmlessness beyond a reasonable doubt. 890 F.2d at 306.

This Court has employed the Chapman standard a number of times to eighth amendment error in a Florida capital sentencing. On only three occasions has this Court found that the State of

Florida had proven beyond a reasonable doubt that the eighth amendment error was harmless beyond a reasonable doubt. See Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989)(error harmless because no evidence of mitigating circumstances presented); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989)(error harmless because defense made strategic decision to present no mitigating evidence); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987)(harmless error where no nonstatutory mitigation presented to the jury). In every other case where mitigating evidence was before the jury and eighth amendment error occurred, this Court has found the State of Florida could not prove harmlessness beyond a reasonable doubt. See Delap; Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989)(record contained evidence that defendant was a model prisoner and "a very nice person [who] got along well with people"); Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988)(record contained mitigating evidence about defendant's mental state and his troubled background); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988)(record contained evidence of defendant's mental state, his lack of an adult criminal record, and his domination by co-defendant); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987)(record contained evidence of defendant's remorse); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(record contained evidence of steady employment history, below-average intelligence, and history of drug abuse).

In Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), this Court found error in penalty phase proceedings because the

defendant was shackled in the jury's presence. Reversal was required because of the potential impact the shackling may have on a jury. The "jury might view the shackles as first hand evidence of future dangerousness." 823 F.2d at 1450. Certainly evidence of prior assaults with intent to murder may also tip the scale in favor of death. Just as in Elledge, reversal is required here.

Thus, under this Court's precedent applying Chapman to eighth amendment error, consideration must be given to what mitigating evidence was presented to the jury. If mitigation was contained in the record, the error could not have been harmless. The reason for this approach is twofold. First, as was noted in Knight v. Dugger, Lockett v. Ohio, 438 U.S. 586 (1978), requires an individualized sentencing which allows the sentencer to hear and give effect to reasons why a sentence less than death should be imposed. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Second, Florida law permits a jury to return a binding life recommendation so long as a reasonable basis for that recommendation exists in the record. "[T]he inquiry is whether there is any reasonable explanation for the jury's life recommendation." Hallman v. State, 560 So. 2d 223, 226 (Fla. 1990) "[T]he fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper." Ferry v. State, 507 So. 2d 1373 (Fla. 1987). Under Florida law, a jury may return a binding life recommendation if mitigation is contained in the record. See Valle v. State, 502

So. 2d 1225 (Fla. 1987). Where mitigation is in the record, a jury is in fact free to return a life recommendation. In such circumstances, error which possibly influenced the jury to return a death recommendation cannot be harmless.

In Mr. Duest's case, the State and the sentencing court have stipulated that "plenty" of mitigation was presented to the jury (PC R. 121). In the state post-conviction proceedings, the sentencing judge stated:

> THE COURT: The court was aware of the fact there was drug abuse.
>
> * * *
>
> THE COURT: I was aware of that, where the family testified during the trial.
>
> MR. McCLAIN: That was nonstatutory mitigation, that was before the jury as well, because the jury heard the testimony about the drug abuse, and I believe the father testified about taking him to Methadone treatment and so forth.
>
> THE COURT: Yes, he did.
>
> * * *
>
> THE COURT: There were also factors where the mother was saying how physically ill he was as a baby and whatever else. I mean I heard all of that. I think I have to say I considered it, but I will go through all the cases again. And I remember that, because I didn't see it anywhere, but I remembered that the family testified to, beyond the presentence investigation relayed because they were there at the sentencing phase as well, and did testify at that time.
>
> So, we are talking about physical and mental and stress, and drug abuse, and prison time.

(PC R. 119-22).

In its brief to the Florida Supreme Court, the State conceded that "evidence of [Mr. Duest's] prior drug history,

therapeutic interventions and status as a good father, husband, son and brother" were presented to the jury (Answer Brief from Denial of a Motion for Post Conviction Relief at 37). Both statutory and nonstatutory mitigating circumstances were in fact set forth in the record.

In the penalty phase, the State conceded that Mr. Duest had a history of debilitating drug abuse (R. 1607). The State conceded that he had helped an inmate:

> What has he done? Well, he has done a couple of things. I stand corrected. The parents, Mr. Duest mentioned to you that he helped an inmate once. Consider that. Consider anything else that was brought out along that line.

(R. 1615). The prosecutor was referring to an incident in Walpole prison where Mr. Duest assisted a guard who was giving aid to an inmate who had been stabbed:

> I don't have much more to say except he has helped people in prison when he was there. He helped a guard with a prisoner that had been stabbed. He went out and him and another person took him to the hospital. The guard couldn't go into the section. He was serving time at that time. He just waited there at the hospital and he didn't escape or anything. He waited for the prisoner to go back with the guard back to prison.

(R. 1578-79). In regard to Lloyd's serious drug abuse history, his father testified:

> A I brought him to a drug clinic. I believe it was in Cambridge, Cambridge, Mass. He had another drug problem a little later and brought him - trying to bring him to another one. He couldn't get into one because they were all filled. He has got a young daughter.

(R. 1578). The State also conceded that there was testimony that Mr. Duest was a good father (R. 1615-16). The State conceded

that these were mitigating factors.

The State conceded that there was evidence upon which the sentencer could find the influence of extreme mental or emotional disturbance in that Mr. Duest had a long-standing drug problem (R. 1607). There was also additional evidence in the record which would have supported the impairment factor as well as extreme disturbance in that Mr. Duest detailed a lengthy psychiatric history:

> MR. BARON: There were two other things he brought to my attention.
>
> One was concerning any psychological history. He indicated to me that he told Miss Balazik that while in Walpole and in -- what was the other prison?
>
> THE DEFENDANT: Concord. I transferred from Walpole to Concord.
>
> MR. BARON: -- he had seen a psychiatrist and been in some kind of therapy. One of them is mentioned in the PSI, I believe the Walpole one, but the Concord one is not mentioned, neither one. My understanding, none of the doctors, from what I'm told, still work within the prison or prison system, so whether or not they would have added anything is unknown at this time.
>
> THE COURT: So there is an omission of one, the Concord one. You have the Waltham one in here, right?
>
> MS. BALAZIK: Yes.
>
> MR. BARON: And the one he's been seeing within the Broward County jail is listed in there.
>
> THE DEFENDANT: I saw a psychiatrist of two years, once a week, one on one, from 1971 to 1973, and I guess three years later I was arrested for illegal possession of a firearm. My parole was violated on account of the arrest.
>
> I was sent to Walpole, did 14 months, went to trial and was found not guilty, and during that 14-month span of time, I also saw a psychiatrist.

> MR. BARON: In addition, he indicated that he gave Miss Balazik a number of additional places that he had worked for whatever period of time that are not included within the PSI. I don't know if it was because they were not confirmed or what the situation was.

(R. 1662-63).

Numerous additional nonstatutory mitigating factors were present in the record. Mr. Duest's father testified that his son Lloyd had been an excellent son, and that Lloyd got diplomas while in prison for counseling younger drug addicts (R. 1577). His sister testified that he had been a good brother (R. 1582). His mother said her son Lloyd was lovable and compassionate, that he was a quiet boy and never a discipline problem at school (R. 1583-84). His wife testified that he had been a good husband and father (R. 1587). Mr. Duest worked on his parent's home, always gave Christmas gifts except for the time when he was on escape status, and loved his family (R. 1671). During his time in the Broward County Jail, Mr. Duest made a significant contribution to group therapy sessions:

> Mental: Records from Walpole State Prison indicate that the subject was seen in 1971 by a prison psychologist on a one to one basis. However, no clinical diagnosis was ever made. The subject is currently in group therapy sessions in Broward County Jail. According to Psychotherapist Gary B. Lane, Lloyd contributed to the group by assisting other inmates in problem solving, bringing numerous newspapers and magazine articles to be shared by the group and actively participating verbally in group interactions. He states that his participation acted as a role model for others to do the same. As a group therapy member, Mr. Duest made a significant contribution to the effectiveness of the sessions.

(R. 1811). Mr. Duest was not known for violence and to the

contrary had a reputation for respect of his family and friends, and helping others:

> Friend, Edward R. Lavache, states, "I am a Watertown firefighter and have been a friend of Lloyd Duest for over ten years During this time I have never known Lloyd to do harm to anyone. I do not believe he would ever take the life of another person. I have always known him to be a loving father and husband, he has always shown the greatest respect for his family and friends. He has always helped me whenever possible and I've never seen him turn down a friend."

(R. 1813). Mr. Duest was characterized as a good worker:

> Friend, James Pallone, states, "I would like to write this Recommendation for Lloyd Duest who I have known all my life. He has always been in good standing and shown Character with my family and his community within the last 25 years.
>
> He has worked for my [sic] for 10 years and was prompt at his job. He showed responsibility and character in his job, and always got along with his fellow workers.
>
> If there is anything I could do or testify to in his behalf please do not hesitate to contact me."

(R. 1813). In fact, the probation officer concluded that Mr. Duest did satisfy mitigating factor (8) in that "he does has [sic] a very supportive family, friends and members of the community in Massachusetts" (R. 1816).

This mitigating evidence which the sentencing judge and the State stipulated was presented at Mr. Duest's penalty phase proceeding is precisely the type of evidence which constitutes a reasonable basis for a life recommendation. DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988) (jury could have considered "deprived family background"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988) (jury could have considered "family history of physical and drug abuse"); Brown v. State, 526 So. 2d 908 (Fla.

1988) ("family background and personal history . . . must be considered"); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986) ("history of drug abuse" constituted a reasonable basis for life recommendation). In light of the mitigation present in the record, the error in admitting the prior invalid conviction for assault with the intent to murder cannot be deemed harmless beyond a reasonable doubt. If just one juror would have switched his or her vote without the evidence of prior murder attempts, a binding life recommendation would have resulted. See Cooper v. State, ___ So. 2d ___, 16 F.L.W. 5375 (Fla. May 9, 1991)(six-six jury vote resulted in binding life recommendation).

In Brown v. Dugger, this Court held that constitutional error was presumed harmful until the State proved harmlessness beyond a reasonable doubt. Where constitutional error occurs in the penalty phase of a Florida capital trial, the error can only be harmless beyond a reasonable doubt where the jury had before it no mitigating evidence upon which a life recommendation could have been based. This is because in Florida the jury recommendation is the result of balancing the aggravation against the mitigation. See Delap; Jones; Knight; Ruffin; Magill; Hargrave. Here, there was, in the words of the State, "plenty" of mitigation (PC R. 121). The mitigation described by the sentencing judge and the State was precisely the type of evidence upon which binding life recommendations in other cases have been based. The jury in Mr. Duest's case was instructed to weigh the aggravation against the mitigation (R. 1799). The scales may

have been balanced differently but for the introduction of an invalid prior conviction for what amounted to attempted murder. There must exist the possibility that the aggravating circumstances were given more weight because of the evidence of a prior attempt to murder two individuals. Under these circumstances the State cannot prove the error harmless beyond a reasonable doubt. This Court must grant habeas corpus relief.

ARGUMENT III

MR. DUEST WAS DENIED A MEANINGFUL AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION DUE TO COUNSEL'S UNREASONABLE FAILURE TO CONDUCT INDEPENDENT INVESTIGATION, AND FAILURE TO PRESENT COMPELLING MITIGATION, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Before the district court, Mr. Duest presented a claim that trial counsel had failed to conduct the investigation and preparation required for a capital penalty phase and thus had failed to present the substantial mitigating evidence which was available in Mr. Duest's case. Mr. Duest argued that trial counsel's failures were unreasonable, not the result of tactic or strategy, and that those failures prejudiced Mr. Duest -- the omitted mitigating evidence would have made a difference to the jury, which voted for death by only a 7 to 5 margin. Although the state circuit court had held an evidentiary hearing on this claim, neither that court nor the Florida Supreme Court made any factfindings whatsoever regarding this claim. Both state courts simply denied relief without explanation. Under such circumstances, an evidentiary hearing in the district court was required in order to resolve the factual disputes necessary to

decide the claim. Nevertheless, the district court declined to hold an evidentiary hearing and denied relief. The district court erred. Mr. Duest is entitled to relief on the basis of this claim and is entitled to a proper resolution of the factual issues involved in the claim.

A. AN EVIDENTIARY HEARING IS REQUIRED

After conducting an evidentiary hearing on Mr. Duest's claim that he was deprived of the effective assistance of counsel at his capital penalty phase, the state circuit court denied relief, writing only: "Alleged ineffective assistance of trial counsel for failure to present compelling mitigating evidence is denied on the merits" (PC R. 680). The court's oral pronouncement was similarly brief: "I will deny Claim 10 and that portion of it [sic] Claim 8 as it relates to this" (PC R. 228).[14] On appeal, the Florida Supreme Court affirmed the lower court, stating simply:

> We reject as without merit the following additional claims:
>
> . . . .
>
> (7) Duest was denied effective assistance of counsel at the sentencing phase of his trial.

Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990). No other references to the penalty phase ineffective assistance of counsel claim appear in the state court record.

In his petition for a writ of habeas corpus, his application

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[14] Mr. Duest's penalty phase ineffective assistance of counsel claim was Claim 8 of his Fla. R. Crim. P. 3.850 motion (PC R. 277, 338).

for a stay of execution and in oral argument before the district court, Mr. Duest argued that the state courts' failure to make any factfindings on the penalty phase ineffective assistance of counsel claim required that the district court conduct an evidentiary hearing (R1-1-215; R2-2-6, 33; R4-73-8). The district court declined to conduct an evidentiary hearing, without explanation, and denied relief, writing:

> Duest argues that at sentencing, trial counsel violated the rule enunciated in Strickland by failing to conduct an independent investigation regarding possibly mitigating evidence that could have been presented at sentencing. The Florida Supreme Court dismissed this claim as without merit. Duest, 555 So. 2d at 851.
>
> Duest's attorney was required to conduct a "reasonable investigation" into possible mitigating evidence. Smith, 840 F.2d at 795. Duest claims that his trial attorney failed to conduct a reasonable investigation by not obtaining his school, hospital, and prison records, in part to present them as background documentation to the mental health experts who examined Duest before sentencing. Duest claims that such investigation and presentation would have bolstered the mitigating evidence he did present at sentencing.
>
> The trial court conducted an evidentiary hearing on this claim wherein it was established that trial counsel did conduct an adequate investigation into the defendants' mental health, family relationships and educational background. Trial counsel was dependent upon the defendant and his family for leads as to relevant data. Trial counsel retained Dr. Patsy Ceros-Livingston to interview the defendant and to prepare a report. The information included in the report was not used at the penalty phase as trial counsel made a conscious decision to exclude it. The report would have opened the door to considerable damaging evidence that would have prejudiced the defendant. Transcript at 155, 157, 175, 176. Included in the prejudicial information was the following: the defendant committed 28 prior felonies, had prior escapes from prison, was found with a knife in prison, had homosexual tendencies, would probably escape again if given the

> opportunity, indicated that he never acted inappropriately in the commission of any crime, and is inclined to take what he wants rather than being able to delay gratification.
>
> Collateral counsel for the defendant hired Dr. Patricia Fleming to interview the defendant and to examine records. She came to a somewhat different conclusion than Dr. Ceros-Livingston, but her report also included some of the same negative observations that Dr. Ceros-Livingston's report included.
>
> This court has reviewed the entire hearing transcript on this issue and agrees with the state court judge that Duest has failed to establish his ineffective assistance of counsel claim. Counsel made strategy decisions which are protected are [sic] under Strickland.

(R3-65-40-42). Without conducting an evidentiary hearing, the district court denied relief by accepting certain facts regarding whether trial counsel's performance was deficient and by ignoring other facts which were contrary to those relied upon by the district court. The state circuit court had heard the disputed facts, but had not resolved the disputes. The district court appears to have resolved some of the disputed facts, but never heard the evidence.

In circumstances such as those present here, where the state courts held an evidentiary hearing but made no factfindings, the district court is required to hold an evidentiary hearing. Code v. Montgomery, 725 F.2d 1316, 1321-22 (11th Cir. 1984). See also Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986)(although state court had held an evidentiary hearing, the district court properly held an evidentiary hearing because "the district court found the state record insufficient to permit a determination of whether counsel's decision not to present mitigating evidence was

strategic or negligent"); Terrovona v. Kincheloe, 852 F.2d 424, 429 (9th Cir. 1988)("An evidentiary hearing [in the district court] is mandatory if . . . the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts"); Williams v. Lockhart, 849 F.2d 1134, 1138 (8th Cir. 1988)(remanding for evidentiary hearing because, inter alia, "the state court findings of fact and conclusions of law are so brief and conclusory that it is impossible to make an independent judgment or to determine whether the state hearing was full and fair"). The Supreme Court has explained:

> There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits.
>
> . . . .
>
> If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.
>
> Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may

> be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied.
>
> . . . .
>
> In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the "so-called facts and their constitutional significance [are] so blended that they cannot be severed in consideration." Rogers v. Richmond, supra, 365 U.S. at 546, 81 S.Ct. at 742. See Frank v. Mangum, supra, 237 U.S. at 347, 35 S.Ct. at 595 (Holmes, J., dissenting). Unless the district court can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determination of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.

Townsend v. Sain, 372 U.S. 293, 313-16 (1963).

No state court made any factfindings whatsoever regarding Mr. Duest's penalty phase ineffective assistance of counsel claim. Both the state circuit court and the Florida Supreme Court simply denied relief in one sentence. As the Supreme Court stated in Townsend, it is impossible to tell whether the state courts believed Mr. Duest's factual allegations and denied relief on the basis of law, or whether the state courts disbelieved Mr. Duest's factual allegations. As explained in Townsend, "[u]nder these circumstances it is impossible for the federal court to

reconstruct the facts, and a hearing must be held."

In denying relief, the district court recited certain matters which the court appears to have determined were the facts established at the state court hearing. However, in relying upon these matters, the district court ignored contrary evidence which also came out at the state court hearing -- evidence which supports Mr. Duest's contentions and establishes that trial counsel's omissions resulted from a failure to investigate and prepare and were not based upon tactic or strategy. See Section B(1), infra, discussing trial counsel's deficient performance. Further, no court, including the district court, has ever discussed the facts establishing that trial counsel's deficient performance was prejudicial to Mr. Duest. See Section B(2), infra. An evidentiary hearing and proper resolution of the factual issues involved in this claim are required.

B. MR. DUEST WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). Decisions limiting investigation "must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763

(11th Cir. 1989). "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). See also Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). Courts have also recognized that reasonably effective counsel must present "an intelligent and knowledgeable defense" on behalf on his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is charged with knowing the law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Moreover, counsel has a duty to ensure that his or her client receives appropriate mental health assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue, Mauldin, and when the client cannot fend for himself. See United State v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

Mr. Duest's counsel failed his capital client. The wealth of significant mitigating evidence which was available and which should have been presented was inadequately presented. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, or on the failure to properly investigate and prepare. Cunningham; Harris; Middleton. Mr. Duest's sentence of death is the resulting prejudice.

As this Court explained in Cunningham:

> The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing the particularized characteristics of the defendant. Armstrong, 833 F.2d at 1433 (citing Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 875, 71 L.Ed.2d 1 (1982)). By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudiced Cunningham's ability to receive an indivuidualized sentence. See Stephens, 846 F.2d at 653-55; Armstrong, 833 F.2d at 1433-34.

Proper investigation and preparation would have resulted in evidence establishing a compelling case for life on behalf of Mr. Duest. A wealth of mitigating information was available to trial counsel in this case. Mr. Duest, however, was sentenced to death by a jury that did not have the benefit of the fruits of a thorough investigation. This was far from an individualized capital sentencing proceeding. Anything counsel could have done would have swayed the 7 to 5 jury's death recommendation to one for life.

1. Deficient Performance.

Defense counsel's lack of preparation for the penalty phase is evident from his response to an inquiry from the State at the very end of the pre-penalty phase conference:

> MR. GARFIELD: Yes, Your Honor. Is there anything else? Who is going to be on the defense side? You said Debbie. Is she going to testify against --
>
> MR. BARON: I don't know. Whoever is left in the family, whoever wants to, if they can.
>
> MR. GARFIELD: That is all I have.

(R. 1568)(emphasis added). Mr. Duest's attorney called four witnesses to testify at the penalty phase: Mr. Duest's father, Richard Duest; his mother, Nancy Duest; his sister, Debbie; and

his wife, Doreen. Including both direct and cross-examination, the entire testimony of these four witnesses -- Mr. Duest's complete case at sentencing -- comprises eleven (11) pages of transcript. *See* *Cunningham*, 928 F.2d at 1017 and n.17 ("trial counsel's minimal questioning of [a defense witness] resulted in the jury's being deprived of substantial mitigating evidence").

Counsel conducted *no* investigation prior to the penalty phase. He did not discuss with the four sentencing phase witnesses the purpose of the proceeding or their testimony. The witnesses were never informed why they were testifying or what kind of testimony would be helpful. They were never told what "mitigation" was or how their testimony related to any sentencing phase strategy. Had counsel talked to the witnesses before lamely eliciting aimless testimony, he would have uncovered a wealth of available mitigating material which could have been presented, and which presents a reasonable probability of a different sentencing result.

In his paltry argument at sentencing, counsel completely neglected to explain to the jury about mitigating circumstances, deferring to the prosecutor:

> I am not going to go over all of the aggravating and mitigating circumstances. You have heard them from Mr. Garfield.

(R. 1619). The one mitigating circumstance counsel discussed at all was the so-called "catch all" factor, but counsel gave the jury little or nothing to consider or relate to the factor:

> Mr. Garfield said that is a catchall. That is a catchall and you can consider anything. Anything you

want as to mitigating factors.

(R. 1619-20). See Cunningham, 928 F.2d at 1018 ("trial counsel never referred to Cunningham's head injury during their closing argument, thereby failing to place this evidence squarely in front of the jury").

There is a great deal the jury could and should have been given to "consider" had counsel performed the requisite investigation prior to the sentencing phase. Mr. Duest was sentenced to die by a jury who never knew the extent of the abusive background in which he was raised. He suffered a lifetime of abuse, rejection, and incarceration. Yet his counsel failed to adequately investigate and develop the available mitigation. Counsel did not obtain school records (PC R. 142). Other than family members, he did not contact any individuals who knew Mr. Duest regarding mitigation (PC R. 143). He failed to explain the process to the family members and ask the questions necessary to learn of the difficult and abusive childhood Mr. Duest endured (App. 7). He failed to obtain hospital and medical records (PC R. 143). He did not talk to Mr. Duest's physician, Dr. Rummerman (PC R. 145). He failed to obtain Mr. Duest's Massachusetts' prison record (PC R. 143). He failed to contact the Massachusetts probation office (PC R. 144). He did not obtain the court file regarding Mr. Duest's prior conviction for robbery and armed assault with intent to murder (PC R. 144). He did not learn of the circumstances of these offenses and that Mr. Duest was in fact an accessory charged as a principle (PC R.

145). He did not investigate or develop the fact that Mr. Duest at age 18 was sent to the maximum security prison at Walpole, nor did he consider the impact such a placement had upon Mr. Duest (See App. 8). He failed to adequately question Mr. Duest's family and learn of the abuse of Mr. Duest as a child (PC R. 146). Counsel also neglected to obtain records establishing Mr. Duest's methadone treatment (PC R. 149). Furthermore, he failed to provide a mental health expert with any background documentation (PC R. 153). Finally, counsel failed to look at Mr. Duest's jail record in Broward County (R. 154).

Counsel's preparation and investigation was inadequate. Choices made on less than complete investigation are not reasonable. Without a complete investigation, counsel cannot make professionally competent choices. Cunningham; Harris; Middleton.

2. Prejudice.

At the state court evidentiary hearing the fruits of a reasonable investigation were presented. The documents from Mr. Duest's background were presented (App. 14 contained in three volumes: Vol. II of Exh. 1 and Vols I and II of Exh. 3). Family affidavits detailing Mr. Duest's abusive background were introduced, as well as an affidavit from a lifelong friend who knew of the extent of Mr. Duest's drug history (App. 7). Finally, the testimony of a psychologist who had the benefit of the background information revealed by an adequate investigation was also presented (PC 46-106). As a result, substantial

prejudice from counsel's deficient performance was shown.

The affidavits and testimony submitted in the state circuit court compellingly demonstrate the prejudice resulting from counsel's deficient performance.[15] These affidavits establish that testimony presented at the penalty phase barely scratched the surface of the evidence available in mitigation. The affidavits also contain essential information on Mr. Duest's and his family history which should have been provided to a mental health expert in order to assure a professionally thorough mental health evaluation on issues relevant to mitigation.

For example, Mr. Duest's parents could have provided a much more humanizing and compelling portrait of Mr. Duest's childhood and youth than was presented at the penalty phase, could have described the environment in which Mr. Duest was raised, and could have explained the problems Mr. Duest encountered. Mr. Duest's mother could have testified:

> My name is Nancy Duest. I reside in Watertown, Massachusetts and I am Lloyd Duest's mother.
>
> I have four children: Nancy born on June 10, 1949; Lloyd born on October 27, 1951; Debbie born on August 11, 1956; and Paul born on April 7, 1958. When Lloyd was born his birth was a little different in that my water bag made a loud bang when it broke. The nurses came running in and gave me ether. Then they had to give Lloyd a blood transfusion in his brain. Lloyd was a sickly child and when he was a month old he had to be operated on for projectile vomiting.
>
> I was a very sheltered person when I married

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[15] Affidavits were introduced at the state court hearing in lieu of live testimony from family witnesses because the state court hearing was held during an active death warrant with no notice and thus no opportunity to obtain live testimony.

Lloyd's father. I didn't even know there was a Watertown Square in the adjoining town because I had never been out of my small town. My husband Richard had a very hot temper. He had a hard childhood and joined the Marines at a very early age. Although he received many medals for his courage, I think all the killing and dying all around him had a deep affect on him.

I think Lloyd had a difficult childhood. When Lloyd was a baby, he used to chew on the edge of his blanket until it was bloody. One time when he was still in diapers, I had him tied to the clothes line outside while I did my housework. When I checked on him, he had come untied and had wandered down to a busy road. Another time when he and his sister were jumping on the bed near an open window on the second floor of the house, I took a strap and strapped them both. Later, I realized that they just thought they were jumping on the bed but I was so frightened that I overreacted.

When Paul was only two, I took my mother-in-law into my house. She was having mental and physical problems and no one else in the family wanted to deal with her. She walked out of a second story window thinking it was a door. As time went on she got much worse. Not only did she have to use diapers, but the doctor advised me to hide all the knives and scissors because he was afraid she would hurt someone. She would throw heavy things and howl like a cat. Finally, when she put a pillow on the baby's head and sat on it, she had to be sent to the Metropolitan State Mental Hospital.

When Lloyd was in second grade, he was doing very poorly in school. The sister told me to have his eyes examined and he had to get glasses. We called him "the little professor" at home and the kids teased him at school. He really hated those glasses. Lloyd was still doing so badly that the school had him psychoanalyzed. The child psychologist said that Lloyd had an abnormal fear of nuns. He was so bad that even a nun's habit would terrify him and we had to transfer him to public school. I have no idea what happened to him to make him so terrified.

Lloyd was generally a respectful son but there were a few occasions when he really did seem to lose control. I didn't realize it at the time, but as I think back now it always happened when I would give something to Paul instead of Lloyd. It was as if he

couldn't handle any rejection. One example was when he and a friend were playing with Paul's basketball and I made Lloyd give it back to Paul. He screamed at me and I told his father. I remember his father grabbing his shirt and throwing him to the floor almost as if he were going to choke him. There was so much screaming that the neighbor across the street came over to see what was wrong.

Lloyd was popular with the girls, and he had one girlfriend he was very close to named Annette. When he was a freshman in high school, Annette became pregnant. They came to me and I told them that if they wanted to get married they could live with us. However, Annette was very young and when her parents found out, they insisted that she have an abortion. This was very upsetting for both her and Lloyd but she was too young to marry without permission. They loved each other dearly and it was very upsetting for both of them. It was shortly after that that Lloyd was arrested and sent to prison.

Lloyd really loved animals. One time he brought home a dog, and we kept that dog for many years. He never was intentionally a bad boy around the house. He never played with fire or tried to take things apart. He did like to fix cars and draw. He drew some pictures.

When Lloyd was thirteen, he had to be operated on for an undescended testicle which he had since birth. He was just beginning puberty and he was very upset. He told everyone it was his appendix so no one would know the truth.

Lloyd became very dependent on his older cousin Richie. He would do whatever Richie said. Unfortunately, Richie was in a lot of trouble and he got Lloyd in trouble as well.

I didn't realize that Lloyd had such a bad drinking and drug problem. I do remember Mr. Bannon calling me from the high school to talk about Lloyd. He said I want to talk to you about Lloyd's friends. There are a lot of drugs here in Watertown. He was trying to tell me that Lloyd had a drug problem but I didn't understand because I didn't know anything about drugs.

When Lloyd was a young man, he got into a terrible car accident. Some other car crossed the street and hit them head on and he had to go to Concord Hospital.

> As I think back now, we made mistakes with Lloyd. He was a very sensitive boy and he just couldn't handle the hard things in his life. We didn't know how to help him or even that he needed special help. He was always a boy who really tried to help others and to please everyone.
>
> My father was a very bad alcoholic. Back then people didn't know it was a disease and everyone just thought he was a bad person. I think Lloyd was like him and we just didn't know how to get him the treatment he needed.
>
> I would have been glad to testify to any of these things at Lloyd's trial if I had been asked.

(App. 7).

Mr. Duest's father could have given a similar account:

> My name is Richard Duest and I reside in Watertown, Massachusetts. I am Lloyd Duest's father.
>
> I guess you could say that I didn't have a very easy life. When I was a child, my father used to make me box with him when he was mad at me for something and it got pretty rough. Then when I went to school the nuns slapped me around. One time I punched out a nun for hitting me in the face for something I didn't do. They transferred me to the Catholic school run by the brothers and they really did beat me. I had to learn to fight to survive and they transferred me in with older boys but I could hold my own there too.
>
> Finally, I ran away and tried to join a Canadian tank brigade to fight the Japanese when I was 15 years old. I couldn't get into the tank brigade so I joined the Merchant Marines. My ship was sunk by the Japanese and many people died. Then I joined the Marine Corps and saw a lot of action. I saw many people die all around me.
>
> When I had a family, I wanted things to be better for them. I didn't have much education and I still can't spell things but I worked three jobs to support my family. I would start the day at 3:30 AM with a job picking up garbage and work until night. It didn't give me much time to spend with my family.
>
> I was hot-headed and had a temper. I treated Lloyd the same way my father treated me. I would back hand him if he was mouthy and I would make him box with

me when he misbehaved. I have large strong hands and I used to grab Lloyd a lot. I thought I was teaching him to be tough and defend himself; but looking back at it now, I think I was too hard on him. I just didn't know it at the time.

When Lloyd was born, there was some kind of problem where they had to give him blood. They couldn't find a vein, so they had to do it through his brain. I remember seeing the blood on his head and being worried about what it might do to him. Then he couldn't keep anything in his stomach; and after a whole month of that, they operated on him for projectile vomiting.

As Lloyd grew up he started drinking and doing drugs. We didn't tell his mother, but I used to take him to the methadone clinic after he got out of prison because he had been addicted to heroin. My wife's father was an alcoholic. I won't say my father was an alcoholic but he was a regular drinker. Maybe that had something to do with Lloyd's problem.

Lloyd was the kind of person who would do anything to help others. He would give you his last dime if he thought you needed it. He was very easily swayed and other people would take advantage of him. His older cousin Richie used to use Lloyd and had a very bad influence on him.

Lloyd could never stand up to Richie and say no. He just went along with Richie until finally he and Richie were arrested for robbery and attempted murder. Lloyd never had anything to do with the attempted murder. He was the driver for the robbery and Richie fired some shots out the window. Lloyd could have gotten off much easier because he was a first offender. However, Richie had a bad prison record and the prosecutor said he would give Richie a lighter sentence if Lloyd would plea to the same sentence. So when Lloyd was only a seventeen year old kid, they sent him to one of the worst prisons in the country. I can only imagine what must have happened to him there because he would never talk about it.

When he got out of prison, he tried to kick the drug habit but he couldn't make it. His habit got so bad, he robbed a drug store just for drugs, not for money.

One time when Lloyd and my wife were with me, I got into a disagreement with a guy over a parking

> space. The guy slammed my car door on my ankles as I was getting out of the car so I punched him and knocked him unconscious. Lloyd had to go to court and testify in my behalf, and I was found not guilty by reason of self defense because I thought the guy might have had a weapon.
>
> When Lloyd was quite young, he and another boy were carving their initials in the snow with a knife. The police arrested him for that. After that they were always after Lloyd for every little thing. Once they stopped him for no driver's license when he really had one. They threw him up against the car and took him to jail. When I got there, he was so upset that he tore a pillow to pieces and they charged him for that too. Another time we moved to the house next door. Lloyd forgot his key and climbed in the window. Several police cruisers came and blocked off the street. They handcuffed Lloyd and refused to believe it was his house until the former owner told them he lived there.
>
> Lloyd tried very hard to please me. One time the local veterans started a boys football team. Lloyd knew I was a big wheel with the veterans and he really wanted to be on the team. It came down to him or one other boy. I told the coaches to pick the other boy if they thought he was better and they did. Lloyd felt rejected and I have often wondered if I did the wrong thing.
>
> Another time some anti-war protesters were picketing our veterans. The adults couldn't do anything so they got Lloyd to go rough them up. When the police were called, they just took Lloyd down the street and let him go because they didn't like the protestors either. I think Lloyd got real confused because sometimes the police were going after him for something he didn't do or letting him go for something he did do.
>
> I think now that I made a lot of mistakes raising Lloyd but at the time I thought I was doing the right thing.
>
> I went to testify at Lloyd's trial but the attorney didn't ask me any of these things. If I had been asked, I would have been glad to testify to all the statements in this affidavit.

(App. 7).

Nancy Kerrigan, Mr. Duest's older sister, could also have

provided her perspective on Mr. Duest's childhood and the difficulties he faced:

> My name is Nancy Kerrigan and I reside in a suburb of Boston, Massachusetts. I am Lloyd's older sister.
>
> When Lloyd and I were growing up, we lived in a public housing project for veterans. It was a really rough neighborhood. Lloyd was a different kind of child. He was timid and frightened. The other kids were always bullying him and beating up on him. He would often come home with bruises and cuts where he had been seriously beaten up. One boy named Buddy Bishop made Lloyd's life so miserable, that I beat up on him for being so mean to Lloyd. Buddy is dead now, from an overdose of drugs.
>
> We lived in the project until I was ten years old. They put in a jungle gym for the kids once. Lloyd took several serious falls from the jungle gym and so did some other kids so they finally had to take it out.
>
> Lloyd had another serious accident when he was a child. We were out driving in our car with my parents in front and Lloyd and I in the back seat. Lloyd leaned on the door and fell out and hit his head. My mother grabbed him and ripped her fingernails out from keeping him from falling all the way. It was such a terrible thing that I can't remember all of it but I know that later we wondered if that had something to do with Lloyd's problems.
>
> Lloyd suffered with a lot of emotional stress at St. Luke's. The nuns terrified him and he never got over it, they were quite cruel. Public humiliation and corporal punishment were the norm at St. Luke's. Sister Mary Carla, Lloyd's first grade teacher would pull the boys' hair and grab them by the ears all the time. Once she made me and a few other girls who were talking in class touch our toes while she lifted our skirts and whipped our behinds with a pointer stick. I remember Lloyd being quite upset one time when one of the nuns beat him in the cafeteria in front of the other children. They were laughing at him and teasing him about it and he didn't want to go back to school. The kids at St. Luke's teased Lloyd mercilessly about his glasses, and the nuns would punish him severely if he would forget to bring them to school.
>
> My father is a fiercely proud and honest man who has always demanded respect. I remember one evening

when I was in the eleventh grade, I had my hair up in those big metal curlers that had the brushes inside getting ready to go out. I mouthed off to my father and he came after me and beat me on the head so hard that the curlers were flat to my head -- but I deserved it -- you just don't talk down to your parents. Sometimes my father would hit Lloyd and there was a lot of hair pulling.

Lloyd was always trying to keep up with me. I was a serious roller skater and skated in competition. Lloyd tried to skate as well as I did and took several really bad falls. He never did really get into it the way I did.

Once Lloyd and I got locked in a closet for about two hours when he was four and a half years old. Lloyd was really terrified. He couldn't stand being locked up. I didn't like it either but I wasn't totally terrified like he was.

Before junior high school, Lloyd was just a defenseless person trying to get attention. He escaped into his fantasy world. He watched Zorro on TV and put Z's on everything. He would wear a cape and jump off chairs pretending he was Zorro. He even got into trouble with his teacher for putting big Z's on his school papers.

As a child, Lloyd was timid, shy and sad. Even when he was smiling, you could see the sadness. He was always trying to please my father but he couldn't live up to my father's expectations. Around seventh grade, he started hanging out with our older cousin Richie.

All of us used to get together with Richie. Richie was the ringleader and he would think up mischief for us to get into. Once we all went into a lady's yard and jumped off a roof. We all tried to jump the farthest for Richie. I hurt my foot real bad but I couldn't tell our folks or we would all have gotten a beating. I outgrew wanting to please Richie but Lloyd never did. Richie was a troublemaker but Lloyd looked up to him as if he was God. That is how Lloyd got involved in the robbery when he was seventeen. Richie did the robbery and got Lloyd to drive.

Lloyd ended up going to a bad prison when he was only seventeen. Lloyd was immature for his age anyway. I don't know what all happened to Lloyd in prison, but when he got out you could tell he was different. It

> changed him from a meek child trying to get recognition to putting on a show of being tough. He learned to survive but underneath he was the same insecure person. You could tell it really did hurt him.
>
> When Lloyd married Doreen it was not good for either of them. They used drugs together and she just went along with his crazy life style. They fed each other's insecurities.
>
> I knew Lloyd as a frightened timid boy. His basic personality never changed. He just had to act tough to survive. Then when the drugs took over his life, he had no control. It makes me very said because he had so many hard times in his life and he just couldn't dealt with it all. He didn't have any role models to help him deal with the abuse and fear. None of us knew how to help him.
>
> If I had been asked, I would have been glad to testify to all these statements at Lloyd's trial.

(App. 7).

Finally, the jury could have heard extensive and detailed testimony regarding the development of Mr. Duest's drug habit and the control which drugs had over his life. Joseph Deveau, a childhood friend of Mr. Duest's, could have explained:

> My name is Joseph Deveau and I reside in Belmont, Massachusetts. I went to school with Lloyd Duest and was a childhood friend.
>
> I first met Lloyd Duest when we both attended seventh grade at the same school in Watertown, Massachusetts. We were both thirteen or fourteen years old at both.
>
> Lloyd and I were good friends and I spent a lot of time over at his house as well as seeing him at school. When I first met Lloyd, he was very studious and nice. He was a really great kid. My family liked him and everyone liked him. He had a girlfriend named Lindsay that he spent a lot of time with. He would carry her books and was polite and just a nice guy. He was not at all wild or aggressive.
>
> Towards the end of seventh grade all of us were drinking and started to experiment with drugs. I

remember that I tried marijuana before Lloyd did. When I told him about it, he got really mad at me and called me a drug addict. But as time went on, we all were using drugs. It was a lot different in the 60s than it is now. Back then drugs were just coming in and there was no drug education in the schools like there is now. We just weren't aware of the dangers.

Sometime in eighth grade, Lloyd's older cousin, Ritchie, got out of prison and that is when Lloyd really did change. Ritchie had been a Golden Gloves boxer and Lloyd used to go see him box. Lloyd really worshipped Ritchie. If Ritchie had been a good person, Lloyd would have been OK, but Ritchie had a drug problem and had been in a lot of trouble with the law. When Lloyd started going around with Ritchie, his personality and his appearance changed. He started wearing leather jackets and let his hair grow. Six months after Ritchie got out of prison, Lloyd was really acting different. He was hanging around with older guys and driving around in their cars.

I didn't think Ritchie would ever have had so much influence on Lloyd if it hadn't been for drugs. By the time Lloyd was 16 or 17 he was just going crazy. It was a real shock to me. I knew Lloyd as a sensitive caring person who cared about other people's feelings and tried to make people happy. This was just totally unlike him. Lloyd was drinking and smoking pot by the end of seventh grade. By the middle of eighth grade, he was doing a lot of downers. In ninth grade, both of us were using LSD.

In tenth grade we went to high school. We were still friends, but Lloyd spent most of his time with a guy who was dealing seconals and downers. Lloyd's dad had taken a bad fall and was crippled for life. I'm pretty sure Lloyd was using his dad's dilaudids too. We didn't spend all our time together in high school like we did in junior high but we would still get high together. I know that Lloyd had needle marks on his arm in tenth grade and at the end of that year he told me he was using heroin.

I remember when Lloyd got arrested for driving the car for Ritchie while Ritchie and another guy did a robbery. Ritchie had a prior prison record and the other guy was a three time loser. Lloyd's family was an oldstyle Italian family and told Lloyd he should stick with Ritchie and take a longer sentence so Ritchie and the other guy would get off easier. That is how Lloyd ended up going to Walpole prison when he

was just a kid.

I saw Lloyd when he got out. He had gotten married to a girl named DeDe. I think they got married while he was still in prison. She was a dope addict. I saw Lloyd about a week later and he told me he was strung out on junk again. Back then there were no treatment programs like there are now. All they would do for junk addicts would be to put them on methadone and try to maintain them that way.

I think it is important to understand Lloyd's family to see how he could be such a good person but also be so vulnerable to the influence of older kids and drugs. I spent a lot of time at Lloyd's house. His father and mother were oldstyle Italians. His father was very dominating and a tough disciplinarian. It was the sort of family where the dinner had better be on the table when he got home or there would be trouble. Looking back now as a father myself, and knowing what children need to grow up in a healthy environment, Lloyd did not get the right kind of parenting. Lloyd's father was the kind of person who would do anything for you, but he was also not a good influence on Lloyd because he was very explosive.

I can give some examples of what Mr. Duest was like. One time when Lloyd was with him, Mr. Duest knocked a complete stranger out cold in a dispute over a parking place. Another time when we were in seventh grade I was at Lloyd's house playing basketball. Lloyd's younger brother Paul was teasing us so Lloyd threw the ball at him but it missed and hit Lloyd's mother. Lloyd's dad came out and punched Lloyd in the mouth two times and was slapping him. He backhanded me in the mouth too so I left and I don't know what else he did to Lloyd after I was gone. Another time when he thought Lloyd was talking back to him, his father, said, you s.o.b., I'll kill you, and he threw a coffee mug which barely missed Lloyd's head and went right through the wall. Like I said before, Mr. Duest has some very good qualities, but he is not a nurturing person and his temper gets completely out of hand.

When they put Lloyd in Walpole prison, there were even more drugs there than there were on the street. When I saw him after he got out of prison, his drug habit was definitely out of control.

I knew Lloyd as well as a brother. Lloyd was naturally a good person. It was the combination of trying to please his father, drugs, and the bad

> influence of the older guys like Ritchie that got him into trouble. Now people understand a lot more about how to get help for somebody like Lloyd who had a bad home life and really did want to kick the drug habit. Back then there just weren't the options for treatment that we have available now and Lloyd never got the help he needed even when he was trying to get help.
>
> I would have said all these same things at the time of Lloyd's trial if I had been asked but his attorney never contacted me.

(App. 7).

Mr. Duest's former wife could also have discussed the extent of Mr. Duest's drug habit:

> My name is Doreen Brady and I reside in Lawrence, Massachusetts. I am Lloyd Duest's exwife.
>
> I met Lloyd Duest in 1973. We were subsequently married and I spent time with Lloyd up until the time he was arrested in Florida.
>
> Since I lived with Lloyd, I was very familiar with his habits regarding drinking and drugs. When Lloyd was straight, he was a very nice person and tried to do right by his family. The problem was that he just couldn't stay away from drugs and drinking.
>
> During the entire time that I knew Lloyd, he had an extremely serious drug habit. He drank heavily of any type of alcoholic drink he could get his hands on. He also took any kind of drugs he could get his hands on.
>
> Lloyd's worst problem was his addiction to heroin. He injected heroin every day. He was so addicted that all he could think about was how to get drugs. When Lloyd was himself, he was a really nice person but when he got on drugs, he was so messed up that he didn't know what he was doing.
>
> I would have been glad to testify to Lloyd's serious drug and alcohol abuse at the time of his trial had I been asked to do so.

(App. 7).

These affidavits present a compelling and humanizing account

of Mr. Duest's life, detailing his frailties, the difficulties he encountered in his youth, the turbulent household in which he grew up, and his early downfall resulting from substantial drug abuse. Testimony such as is contained in these affidavits would have assured an individualized capital sentencing "by focusing [the jury's attention upon] the particularized characteristics of [Mr. Duest]." Cunningham, 928 F.2d at 1019.

Furthermore, on the basis of a thorough background investigation, defense counsel also could have obtained significant mental health mitigating evidence. In conjunction with a review of extensive background materials (see App. 10, p. 1), Dr. Pat Fleming conducted a mental health evaluation, and testified before the state circuit court (PC R. 46-106). Dr. Fleming testified that in addition to conducting interviews with Mr. Duest, she reviewed "voluminous material" for her evaluation (PC R. 54), including affidavits and court, prison, and school records (PC R. 55-57). Dr. Fleming explained that a review of history was essential because the history "lays the foundation, the framework for later behavior" (PC R. 69).

Dr. Fleming testified that two factors in family history were significant in understanding what happened in Lloyd Duest's life: the family history of abuse and of substance addiction (PC R. 66). These historical factors are important "because they are the basis for the later life, and the parents usually rear their children as they were reared, and we all know that addiction, be it alcohol or drug, has a familial quality, genetic and

environmental in varying degrees" (Id.).

Dr. Fleming described the environment in which Mr. Duest was raised and how that environment resulted from the way his parents had been raised:

> Considering all the information I had available, including the clinical interview, I found a young man who was reared in an abusive family. All of the affidavits and his testimony support that. What the earlier testimony did not really indicate was the extent of the abuse. Mr. Duest, Sr., was reared in an abusive family himself, in an alcoholic abusive family. His mother was also reared in a severely alcoholic family.
>
> THE COURT: Mr. Duest; this Mr. Duest?
>
> THE WITNESS: Mr. Duest, Sr.
>
> THE COURT: Mother and father both?
>
> THE WITNESS: That's correct. Were both reared in abusive alcoholic families.
>
> Mr. Duest had a military career where he served in the Marines, and that was brought out previously, the damage and the trauma he saw there. What happened by virtue -- which is often true in abusive families -- of that Mr. Duest reared his son as he had been reared, and his grandfather reared his father in a very, very macho way, teaching him to be tough and to survive. Mr. Duest Sr. was a boxer, and he believed in boxing with his children, as he had been boxed with, even despite the disparity in size and strength, to teach him to be tough. The family was -- it was a tough neighborhood. And Mr. Duest valued the macho. His mother traditionally and typically walked, literally two steps behind. The father was the ruler. She was a very passive woman, and that was quite typical of that culture and that time, who never interfered with the abuse.

(PC R. 64-65).

> I mentioned that the mother, Mrs. Duest, Mr. Duest's mother, was reared by an alcoholic father. He, Mr. Duest, Sr., was reared in an abusive alcoholic home. Mr. Duest, Mr. Lloyd Duest's father, developed an alcohol problem himself. Mrs. Duest sometimes, the

> mother, drank excessively. Mr. Richard Duest, Duest's brother, just recently died of cirrhosis of the liver, this is Richie Duest which is -- what happened was, two brothers married two sisters, so there was a close both intermingling and genetic background, very tight. Very tight.
>
> Q In this case could you, did you, have you concluded that Mr. Duest was an abused child?
>
> A Yes. The evidence is really clear, and I could give you many incidents of that abuse if you want the type of abuse it was.
>
> Q Can you explain -- What I am interested in is an explanation of the type of abuse we are talking about, because abuse is a fairly broad term.
>
> A The type of abuse was physical and psychological. The first is physical. Mr. Duest at this time, I'm talking about Sr., was a boxer. He's a big man, and he would throw things. At one time Mr. Deveau stated that when he was there he became angry at Mr. Lloyd Duest and threw a coffee cup at him and it went into the wall. He would take his son and beat him against his chest and then say, you know, hit it like a man. He would drag the children by the hair, he would throw them across the room. He was -- he was harsh. It was -- that family was in a neighborhood where this was not uncommon, although, one of the affidavits states that the neighbors would come because they would hear the screaming and come to see what was wrong.

(PC R. 66-68). Knowledge of this kind of abusive history is important to understanding a person because the abuse "forms your conception of who you are, how you react, and how you cope" (PC R. 69).

Dr. Fleming then explained Mr. Duest's reaction to the abuse he experienced and how he tried to cope with it:

> Initially he coped by being very shy and withdrawn. Initially he was described as a good boy. This family was a strict Catholic family, and the sister describes how they would play church and he would be the priest and she would be the nun. They believed in heaven and hell. And so he was reared in that, you know. You are abused by your parents and you

do what is told.

So he was very shy. He went to school, to a Catholic school. And the documentation by the school psychiatrist states that he was really traumatized by the nuns, who evidently, in that particular era and in that school, believed also in corporal punishment. And Lloyd was a daydreamer, which is not atypical of abused children.

What often -- one way of coping is by dissociating, we call it. And the children do not absorb; they just shut off.

When he went to school, by his report and other documentation, he simply didn't listen. He has normal or above normal intelligence by the estimates, yet he was retained in second grade, and finally the school psychiatrist, because he was having nightmares, and even fearful of the nuns' habit, recommended that he be moved to the public school.

Q In Mr. Duest's background, one of the things you I am sure saw was a fair amount of criminal activity that developed?

A Yes.

Q And different charges and different pleas to different crimes. How does child abuse relate to that, or does it? Or in Mr. Duest's case?

A Well, we got through third grade where he was being withdrawn and dissociating and cutting everybody off, and this continued evidently until, you know, through sixth grade, the early elementary grade.

However, he had a friend that had a father that had ale in the basement and so they would go over and nip at the ale in the elementary grade, and that was one way of coping. And it was accepted; alcohol was accepted in that background. His uncle would give them alcohol to drink, but that was one way of coping was to drink. Later, he used drugs. He was breaking and entering to get money. It was all tied up to the addictive process, which Mr. Duest had two main ways of coping: One was to dissociate and not acknowledge, or deny; and one was to use drugs, alcohol, and that was his self medication. That's not atypical.

Q One of the things you mentioned is an addiction problem, how does that come about, is that a

product of the child abuse; what can you say about that?

A That was one way of coping and it was also available in that particular neighborhood. Because of that early background, and other statements support that, that he really needed approval.

He didn't get his father's approval. He never quite measured up to him. And he was very prone to, you know, to following, not leading. And he wanted to be the kind of a tough guy, and he had a -- the cousin, the double cousin, Richie Duest, who already had been convicted and he used him as a role model.

It all just followed; the addiction that developed gradually. He started early smoking marijuana. He started as early as high school of injecting different downers. He injected the Methadone.

He -- then he got -- the final incident was his charge that sent him to Walpole, which is -- we all know the prison setting there. It was at that time he was -- I think he was 18 when he was charged on the robbery charge and convicted, and I think 19 when -- he just turned 19 when he got to prison. That was a hard prison. That's where they sent the Boston Strangler. And he at that time, in that prison setting, where drugs were very available, he was a runner for drugs, getting drugs and passing them around, because that's how -- and he became addicted to heroin at that time.

. . . .

Q (By Mr. McClain) Can you tell me, wanting approval from others, what's the source of that?

A He did and does want approval from other. The source of that is, I believe, was the failure -- he was a shy, withdrawn child; he was by himself a lot. The failure to please father; when he did not please father, he was either psychologically or physically abused. The father called him a wimp. He knew he had to be tough to win approval. The best example was the father was boxer. He wanted him -- his father -- to be a boxer. He won nineteen straight matches, he lost the twentieth and the father never had anything to do with his boxing career again. That's a good example of the high expectations his father had that his son never really reached.

> In school he was shy and withdrawn. He finally got recognition in junior high by being more the tough one; drugs give us an omnipotence. He felt better when he was using drugs, as do drug users.
>
> Q Do we know in terms of the addiction, is addiction environmental; are people subject to addictions because of environment or is it hereditary, or do we know?
>
> A All of the above, actually. There is more evidence that there is a genetic predilection to drug abuse, however, people without that can become addicted, it doesn't have to have a familial background, but there is strong indication now that some people are more easily addicted than others. And in Lloyd's case he had two, he had the familial, environmental abuse and the substance abuse in the family, and then the background, the genetic background.
>
> . . .
>
> The prison environment, and we are familiar with that, you belong or you -- especially if you are a young person -- you don't make it, and so, but for his background actually Mr. Duest was not -- I suppose no 18 year old or 19 year old is ready for prison. He was terrified at that. He adjusted there by belonging to a group and using heroin.

(PC R. 69-74).

Finally, Dr. Fleming summarized the significant factors in Mr. Duest's life:

> I see first the physical and psychological abuse of this boy as a child and as a young adult. This is clear, and it was severe. And the second is, I see a true lack of direction of societal intervention at that time, a time when it would have made a difference in this young man's life. It was inexcusable to place him at that prison. I don't understand the dynamics of that.
>
> The other great impact is his being led by others, his need for approval, and so he would follow, particularly the cousin, where he had the pressure at that time, when he and the cousin were arrested, and both his attorney and his family said you join in with Richie and you say you are guilty of the same crime

> because he will get a lesser sentence and you have never been sentenced. He did this. That was just another way of his finally winning approval from his family and from the attorney. I see him very vulnerable for that.
>
> The drug dependency and the whole addiction played a significant part in the whole scenario, and I think that those four factors, as I outlined in my report, are significant.

(PC R. 77-78).

An account such as Dr. Fleming provided of Mr. Duest's character, difficult life, and drug dependency would have been compelling mitigation. Such an account not only would have explained Mr. Duest's life, but also would have explained that his life was shaped by his family's history and by the environment in which he was raised. Counsel simply failed to look. Counsel failed to obtain the essential history regarding Mr. Duest's life and family, and failed to provide a mental health expert with any background information. See Cowley v. Stricklin, 929 F.2d 640, 644-45 (11th Cir. 1991). That failure was patently unreasonable. All of this evidence was highly mitigating. All of it was available to trial counsel. All of it should have been uncovered and presented to Mr. Duest's jury and judge. Trial counsel's failure to do so was deficient performance that rendered the penalty phase an unreliable, ineffectual, non-adversarial testing. Confidence in the outcome must be undermined in light of the plethora of mitigation set out above. The penalty phase was not an adversarial testing of whether Mr. Duest should live or die.

C. CONCLUSION

In *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989), this Court held, "[e]ach counsel testified that he believed that the other was responsible for preparing the penalty phase of [the] case." 874 F.2d at 763. The court found deficient performance, recognizing that there was no "informed judgment" to forego investigation, but merely "neglect". Similarly, in *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988), the court explained that the question is whether the failure to uncover mitigation was the product of "a *tactical choice by trial counsel*." 849 F.2d at 493 (emphasis in original). The court there concluded:

> Trial counsel simply failed to make any effort to investigate Middleton's background and, therefore, had nothing to introduce to mitigate the sentence of the jury.

849 F.2d at 494.

In short, had trial counsel conducted a reasonable investigation, he would have been able to marshall a powerful penalty phase case and closing argument that not only would have portrayed his client as a redeemable human being whose life had value but also as a human being whose difficulties stemmed from an abusive childhood and drug dependency. He also could have presented evidence to minimize or negate the aggravating circumstances argued by the State.

Instead, defense counsel did virtually nothing to develop this mitigation. In *Harris*, this Court noted:

> [T]he prejudice component in *Strickland* requires close scrutiny. It is critical to the reliability of a capital sentencing proceeding that the jury render an individualized decision. *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976);

> Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976); Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir.1987). Thus, the jury's attention should be focused on the "particularized nature of the crime and the particularized characteristics of the individual defendant." Gregg, 428 U.S. at 206, 96 S.Ct. at 2940. In this case, the sentencing jury knew much about the crime, having just convicted Harris of a brutal murder, but little about the characteristics of the defendant.

Harris, supra, 874 F.2d at 763. So, too, in Mr. Duest's case: counsel's neglect deprived the jury of substantial evidence and documentation regarding Mr. Duest's character and background. Here, as in Harris and Armstrong v. Dugger, 833 F.2d 1430, 1432-34 (11th Cir. 1987), there was mitigation which counsel without a tactic simply failed to investigate. Here, as in Armstrong, "[t]he demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement." Id., 833 F.2d at 1434, citing Strickland v. Washington. The facts of the offense no more undermine the mitigation in Mr. Duest's case than the brutal facts of the offense in Harris v. Dugger, supra. Here, as in Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988), the evidence at issue cannot be dismissed as "cumulative". Likewise, as in Cunningham v. Zant, the fact that trial counsel presented some evidence at the penalty phase does not defeat Mr. Duest's claim, especially since, as in Cunningham, the omitted evidence was available from witnesses who were present at the penalty phase and was essential to an individualized and particularized consideration of the appropriate sentence. There is no difference between Mr. Duest's case and the facts found

sufficient to establish prejudice in Harris, Armstrong, and Stephens.

Moreover, consideration must be given to the import of Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny:

> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the [sentencer] must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the [sentencer] is to give a "'reasoned moral response to the defendant's background, character, and crime.'" Franklin, 487 U.S., at --- (opinion concurring in judgment)(quoting California v. Brown, 479 U.S., at 545 (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, 428 U.S., at 305, the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989) (emphasis added).

In Mr. Duest's case, background and mental health mitigation was not presented because of court-appointed counsel's neglect. However, if counsel had developed the mitigation and tried to present it, but was not allowed to do so because the trial court ruled it inadmissible, under Penry and Skipper v. South Carolina, 476 U.S. 1 (1986), Mr. Duest would be entitled to a new

sentencing because his death sentence would be unreliable.

This is wrong under Strickland. The court there noted:

> In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

466 U.S. at 696 (emphasis added).

In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), cert. denied, 477 U.S. 998, this Court considered the interplay between Lockett and its progeny and the prejudice prong of Strickland:

> Certainly [petitioner] would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, [counsel's] failure to seek out and prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

758 F.2d at 535 (emphasis added).

Thus, where due to deficient performance mitigation is not discovered and/or presented to the sentencer, the question is whether an adversarial testing occurred, whether confidence in the outcome is undermined, and whether the sentence of death is sufficiently reliable to satisfy the eighth amendment. See

Penry. Here, no adversarial testing occurred, confidence in the outcome is undermined, and the death sentence is flatly unreliable. An evidentiary hearing and relief are proper.

ARGUMENT IV

MR. DUEST WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO OBJECT TO OR ATTEMPT TO RESTRAIN THE PROSECUTOR FROM INJECTING HIS OWN OPINIONS AND EXPERIENCE, REFERRING TO MATTERS NOT IN EVIDENCE, MISSTATING EVIDENCE AND TESTIMONY, AND ARGUING NON-STATUTORY AGGRAVATING FACTORS.

A prosecutor is not allowed to express his personal opinion as to the truth or falsity of testimony or on the guilt of the defendant. See ABA Standards for Criminal Justice sec. 3-5.8(b) (2d ed. 1982); ABA Code of Professional Responsibility DR 7-106(4) (1976). Similarly, a prosecutor must confine his argument to the facts in the record, reasonable inferences from those facts, and matters of common public knowledge. It is improper for a prosecutor to misstate the evidence, to misrepresent the issues, to mislead the jury so it may draw damaging inferences, or to argue on the basis of facts outside the record. See ABA Standards for Criminal Justice secs. 3-5.8(a), 3-5.9 (2d ed. 1982). Such misconduct renders a trial fundamentally unfair and its outcome unreliable, in violation of the sixth, eighth and fourteenth amendments.

The prosecutor at Mr. Duest's trial repeatedly injected his personal opinions, beliefs, and experience into the trial. Defense counsel, however, allowed this conduct to go unchallenged, unreasonably failing to interpose a single objection to the prosecutor's diatribe. See Vela v. Estelle, 708

F.2d 954 (5th Cir. 1983). Considering the difficulty the jury had in reaching a guilt-innocence verdict and the jury's close 7 to 5 vote for death at the penalty phase, defense counsel's failures surely prejudiced Mr. Duest. See Taylor v. State, No. 74,260 (Fla. June 27, 1991)(resentencing ordered because defense counsel objected to prosecutor's improper argument which "urged consideration of factors outside the scope of the jury's deliberations"; previous case involving similar argument not reversed because defense counsel made no objection).

In his opening statement, the prosecutor set the stage for what was to be two weeks of pressing the limits of ethical prosecutorial conduct.

> I will not deliberately mislead you. I want you to know that I consider myself fallible. I may at this time misstate what I think some testimony is going to be. If I do, it is not going to be on purpose. If it turns out that there is any discrepancy between what I tell you now and what a witness says, that is just my fallibility.

(R. 403-04). It did not take long for the prosecutor's "fallibility" to surface. In fact, he could not make it through opening argument without pouncing on Mr. Duest's alibi defense, resorting to inappropriate invective and charges that simply were not borne out by subsequent evidence or testimony:

> [O]ne of the things I would like you to bear in mind while his case is being put on is how this, quote, unquote, alibi got developed among the family. I think it is going to come out that basically they didn't start putting together an alibi, the family didn't for this defendant, until September 16th of 1982, approximately five months after their son was arrested. They get together in some lawyer's office, named Bradley, up in Massachusetts. That is where they started with an alibi from February. Even though they

> knew in April that the crime he was charged with doing was committed in February.

(R. 423). Counsel did not object to this insidious and inaccurate characterization of Mr. Duest's "defense".

In closing argument at guilt-innocence phase, the prosecutor's "fallibility" emerged in full blossom. His argument is permeated with improper injection of opinion, comments on credibility, reference to his own experience, and misstatements of the evidence. Examples follow (all emphasis is added):

> *Mr. Fralick was pretty smooth. If that sucks you in that is your prerogative*. But what I am saying, you can consider a lot of different things and one of the things was the sincerity of that man Long to come here in a public place and tell 14 strangers in a packed courtroom that *I am a homosexual and that I went home with this guy*, et cetera, et cetera, et cetera.

(R. 1409). Mr. Long *never* said anything of the kind.

> ...To me it is a critical point in this case. Mr. Long told you -- First of all, Long testifies and *I believe tells you obviously a full comment of what happened*. Mr. Baron gets up and there is nothing Mr. Baron can do with him. *I have never seen anybody flounder about and flutter at straws as Evan*. Apparently not because he is an excellent attorney. I think he is a good attorney. What he is going to do -- You know why it is hard to examine? Sometimes, see, *when you have got testimony which is so weak or what they have to say is so impeachable, it is not hard*. I sit there with a deposition. I am not going to recreate all of these depositions. I sit up there. Debbie Duest is up there. *I look down at that deposition and I see 50 things in contradiction*. I don't have to be an all-star. It doesn't take a lot of ability. Don't look at me and say boy, that prosecutor is sharp. *An idiot can get up there and look at that deposition and knock down a witness like that because there (sic) obviously fooling*, they don't remember a damn thing. It is-self evident.

(R. 1409-10). She didn't know if he was trying to pick her up or what (R. 1414). This is pure fabrication by the prosecutor.

> No reason in this God's earth for her to tell a lie to you people. You couldn't even conceive of a reason. She is not a kooky person.

(R. 1418).

> Just a remarkable similarity here. You know the only thing that I can't see in looking and comparing that sketch to this actual photograph of the actual killer in this case, the only thing I can't see is the eyes. The eyes look a little different to me. I don't know. It doesn't look that perfect. Although I started thinking if O'Donnell is seeing him while he is sitting under a 900- watt light, maybe his eyes are constricted. That is what happens when you are sitting under a bright light. Maybe that is why his eyes -- Actually they might be similar. Seems to me his eyes just are slightly constricted in this photograph - in this sketch, whatever.

(R. 1422).

> All I can say, Matthew Turner and Diane Turner were two of the most argumentative, evasive and hostile witnesses that you have seen in this trial.
>
> Now, it may have been a little my fault. Remember, I got mad? I admitted I got mad. That is not good for a lawyer to do. You lose [sic] your ability to be objective when you get angry. I don't know why I got angry. I think because those people weren't giving me straight answers. More importantly, they weren't giving you straight answers.

(R. 1423-24).

> One thing you do know from the defense, this guy needed money. You know he needed money; don't you? Every single witness had him borrowing money. They all remember that because every God damn time they saw him he borrowed 500 bucks.

(R. 1427). This was a gross and inflammatory distortion of the testimony.

> Obviously you know what he did there. It was apparent he didn't like the answer. I don't blame him. How would you like to fly all the way up to Massachusetts for an alibi and have your witness say yes, it could have been some other day. Right, it was the 14th for sure. Yes. I wasn't impressed. That

> part didn't impress me a whole lot.

(R. 1428).

> Boy, did we argue about snow, Debbie and Paul, about the snow because of their tailoring their testimony. It seemed like it to me.

(R. 1429).

> Now, O'Donnell, remember, he told you there was a golf tournament, I don't work on Mondays, came in there to give somebody the ticket. Just standing around bullshitting is what he is doing. He sees Pope leave with the fag - with the defendant.

(R. 1431).

> He is back at the residence between 4:00 p.m. and 5:00 p.m. when Danny returns with a gold Camaro. This is the Danny.
>
> Well, anyway, this is the guy that doesn't have a car all weekend. You know, no one had a car. Now, he is in a gold Camaro. You know, Mr. Baron and I stipulated - the one stipulation we had - was that gold Camaro vehicle was in fact the gold Camaro found in the case. We could prove that easily. We just stipulated to it.

(R. 1434). There was never any stipulation about the Camaro "Danny" was driving. The stipulation was only that the gold Camaro was registered to the victim and was found abandoned on March 3, 1982, and that no fingerprints of Mr. Duest were found in the car (R. 965).

> Maybe the detectives are sloppy. Maybe you think the BSO detectives division is sloppy. I thought they were terrific.

(R. 1441).

> Now, Mr. Fralick, I will get to him later. I want you to consider a few things about Steven Fralick, the smooth guy over here. He grew up with the defendant. He grew up with him. Ten to fifteen years they were teenagers together.

(R. 1441). Here, the prosecutor virtually created testimony that did not exist.

> In case you are wondering how the name Lloyd Duest can be on there and why the heck do you put a name on a receipt for a lousy fan belt, that is interesting to me, too. A fan belt for a car that he didn't have? Interesting to me.

(R. 1442).

> Okay. Now, we have got the dinner party at Debbie's. We have got Nancy Kerrigan. Nancy Kerrigan for a while I think made a good impression at least on me and then I realized - that I submit to you, and I don't mean to be insulting or anything - I think she is a little bit cutsie-pie. Here is a woman, gets up there too nervous really to be a witness. What does she do? She throws in about her basset hound. Remember the basset hound? "Oh, yes, I have got a basset hound." Little grin. You going to believe me people because I am so cute? Then she has got the Bible. She got that in. Nancy, you are a hell of a witness.

(R. 1443).

> She is the one that said Lloyd is blind as a bat. Blind as a bat. You know, I don't have to dignify anymore. You know that is a bunch of bull.

(R. 1444).

> I don't know if it really happened the way it was supposed to have but to save it months and months, a fan belt receipt for some car. Who cares. Some people keep maintenance records. I can understand that. I can understand Mr. Duest - Richard Duest, "Yes, I keep my receipts." I can understand. He was a businessman. He wants whatever he wants for tax purposes, that I do not understand. I do not understand that.

(R. 1444-45).

> The guy lied about that or he is mistaken I should say. Everybody said he was there. Every witness, I say, "Would it be true or false, this statement, Richard Duest was not present in the room or waited outside?" Everybody said false.

(R. 1446). No, several witnesses said it was not false.

> Incidentally, I want to get to that little piece of paper that he is so proud of, Defense Exhibit 1. I am going to get to it. You know me well enough by now. Before I get to it, though, I am just going to reply to a few of his lesser points that I don't think are really that impressive. I can very briefly respond to several points because when I spoke to you earlier I told you basically and fully and thoroughly how I feel about this case.

(R. 1500).

> As to the lineup, Mr. Baron brings out that the defendant was given an opportunity to pick whoever he wanted to stand in the lineup, but since he didn't then Mr. Baron now says that it wasn't a fair lineup. I don't understand that. That means I am damned if I do or damned if I don't. So what is the point there. You can see the lineup. I think it is a fair lineup. I don't know.
>
> * * *
>
> First of all, I am not trying to tell you everybody is lying. I really never have contended that. I am not sure everybody is lying or not lying. I am quite certain, based upon the evidence, that everybody is either mistaken or lying. That is my position. That is my feeling based on the evidence. But if you do want to be a good liar you don't try to memorize that it was 3:51 when somebody walked in and stuff like that. The easiest way to be a good liar, and you all know, just think about this for a little while, the easiest way to be a good liar is to tell basically the entire truth because they don't have a problem when it comes to reality. You can relate back in your mind to the entire truth. For example, if I wanted to convince one of you that back on February 15th, on Monday evening, that my defendant brother was present with me eating, I don't have to lie about the dinner, you know. What I am going to tell you, I am going to tell you I had ham. I am going to tell you I had sweet potatoes, et cetera, et cetera. All I got to do, I don't have to lie on that. All I just tell is the exact truth about that. All I do is add one thing in. I say the defendant walked in and said hello and left because that is easy, see. That is the smart way to lie.

(R. 1502-03).

Mr. Baron is under a mistaken assumption here as

> to how I view the significance of the little piece of paper. He thinks that it is important to me that there is supposed to be February 1 there as opposed to February 15th. It is not. I couldn't care less. I think if it said February 15th that would not affect the way I regard this piece of evidence. What made me angry, what made me angry was when I have a man up here, see, and I put the magnifying glass down there and at least I know there is not a five and you know, no, there is not a five there. It makes me angry for a witness to be bias enough that he is going to say there is a five there and that tells you something. That tells you something.
>
> In other words, I wouldn't be surprised if there was a five there because that is not what happened with this. Just like what I was telling you before, when you wanted to lie you basically keep everything the same. You see, those records are basically true records. Where is the rest of this stuff? You see, not all these - everything adds up. I checked this and worked this through my little brain. It all adds up. I wonder what the story here is.

(R. 1504-05). Defense counsel made not one objection to the improper and prejudicial comments made by the prosecutor during his closing argument.

In closing at the penalty phase, the prosecutor urged the jury to consider a number of non-statutory aggravating factors. Florida's death penalty statute states explicitly that aggravating circumstances are "limited" to those factors enumerated in the statute. Fla. Stat. sec. 921.141(5). See Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Proffitt v. Florida, 428 U.S. 242, 250, 257 (1976). The prosecutor's penalty closing repeatedly argued Mr. Duest's alleged "lack of remorse" as a reason for imposing death.

> The defendant in this case has taken the position that he did not do this. Therefore, he has no remorse in this case.

(R. 1596). "To equate a defendant's not-guilty plea with lack of remorse ... in support of the death penalty would in effect punish the defendant for exercising rights of due process." Pope v. State, 441 So. 2d 1073, 1077 (Fla. 1983). Later, the prosecutor added: "No remorse. All that time. All that time." (R. 1605). In final argument to the Court, the prosecutor hammered home at "lack of remorse" in urging death:

> And I agree with Detective Carney there is a total lack of remorse. I don't care what this man wants to contend. He can stand here and say whatever he wants. It is his perfect right to do so. But as far as the State is concerned, this man has been a one- man destructive force throughout his life.
>
> You know, we've seen what happens when a rabid dog runs around and the destruction that a rabid dog can inflict upon people. This man has a rabid dog beaten by quite a bit. Dogs cannot make moral judgments, but people can, and Lloyd Duest made a moral judgment back on February 15, 1982 and, in fact, Lloyd Duest believes in the death penalty , Judge. I say he does because he rendered it upon John Edward Pope, Jr.

(R. 1687).

The Florida Supreme Court has made it abundantly clear that "lack of remorse" must play no part whatsoever in the sentencing determination. Pope, 441 So. 2d at 1078 ("lack of remorse should have no place in the consideration of aggravating factors ... absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor."); Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985)("Moreover, we have held that under the statute it is error to consider lack of remorse for any purpose in capital sentencing."). Defense counsel was ineffective for failing to object to the prosecutor's

injection of an impermissible factor into the sentencing calculus. Taylor.

In arguing the applicability of the "heinous, atrocious, and cruel" aggravating factor, the prosecutor improperly sought to have the jury consider irrelevant characteristics of the victim, urging them to look at a photograph of him, pointing out that he was a "young 64 ... pretty young for his age," that "he had a family, too."

> The victim was what I would call, and what he has been called by the witnesses, a young 64. You remember the picture that was in evidence of him, of Mr. Pope. That was a live and well picture, so it is not a gory photograph. I just want you to recall State's Exhibit 16. There he is. Look at the age of the people that he is with. Pretty young for his age. Enjoying his life. Perhaps, he was gay. I watched you people too long to believe that that makes any difference to you. He had just as much of a right to be the way he was as anybody else has to be the way they are. Of course, he had a family, too. I am not going to dwell on that but you have heard from the family of Mr. Duest. let's not forget that the person who is dead has a family also. They loved him and he loved them. So much for that circumstance. I submit to you that that does apply in this case. Number eight, wicked, evil, atrocious, or cruel.

(R. 1596-97). "Young for his age" and having a family are not aggravating factors under Florida law. As such, they are impermissible factors to consider in aggravation, and counsel's failure to object to their consideration constituted ineffective assistance. Taylor.

The prosecutor also used the fact that Mr. Duest did not serve in the military, and argued that there was no evidence "to indicate he particularly supported children," that "he borrowed money," and that he was a "taker not a giver" in urging death.

These, too, are entirely impermissible factors. Again, defense counsel failed to object. *Taylor*.

> *He was never in the military*. I mean, sometimes a person went to war and had been decorated a veteran or something. Well, at least he served his country. *He was never in the military*. *I have seen or heard nothing*. *You have heard nothing*. *You heard nothing to indicate that he particularly supported children*. You heard he was -- Every time he made an appearance it was to borrow money. *He borrowed money from his sister, Debbie*. *He borrowed money from his father*. ...
>
> Here is the kid. What does he do for his old man? Give me $500 bucks, Dad. That is wonderful. So *it looks to me, and you decide for yourself, it looks to me like this defendant is a taker, not a giver. I don't see anything he gave. I just don't see anything he gave*.

(R. 1614-15).

One of the primary functions of defense counsel is to protect his client from precisely the type of prejudicial and improper invective that permeated Mr. Duest's trial. The unreasonable failure of his counsel to perform this function violated Mr. Duest's constitutional rights, in that there is a reasonable possibility that without the omission, the result would have been different. *Vela v. Estelle*.

The prosecutor's comments violated Mr. Duest's eighth and fourteenth amendment rights, separate and apart from the sixth amendment ineffective assistance of counsel claim, and it cannot be said that the comments had no effect on the guilt/innocence and sentencing proceedings.[16] Certainly, given the 7-5 jury

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[16] Judge Ryskamp ruled that had defense counsel objected the issue "would have been disposed of quickly as either not error or at best harmless error" (R. 3-65-43). Judge Ryskamp's conclusion is in error.

recommendation, there is a reasonable probability that but for the misconduct the result in the case would have been different. An evidentiary hearing is required on this claim of ineffective assistance of counsel, and thereafter habeas corpus relief will be warranted. See Kimmelman v. Morrison, 477 U.S. 365 (1986).

ARGUMENT V

THE FAILURE TO HOLD AN EVIDENTIARY HEARING ON THE ASPECTS OF MR. DUEST'S BRADY CLAIM THAT THE STATE COURTS SUMMARILY DENIED WAS ERROR.

In state court, Mr. Duest presented a Brady claim based on non-disclosure of exculpatory evidence in addition to the bus ticket. See Argument I. However, the state court evidentiary hearing was limited to evidence concerning the non-disclosure of the bus ticket.

Mr. Duest's Brady claim was also presented in his petition for habeas corpus. No evidentiary hearing was allowed. The need for an evidentiary hearing was manifest on the basis of Mr. Duest's allegations. A federal district court cannot summarily deny a petitioner's claims before any fact-finding procedures have been had and before the petitioner has had the opportunity to prove his claims at an evidentiary hearing, unless the petitioner's claims are so "palpably incredible" or so "patently frivolous or false" as to warrant summary dismissal. Blackledge v. Allison, 431 U.S. 63, 76-77, 78, 81-83 (1977). Petitioner's claims are neither "palpably incredible" nor "patently frivolous or false." In this case, however, although evidentiary resolution was not allowed in the state courts, the district

court declined to allow any in this federal forum, contrary to llison and Townsend v. Sain, 372 U.S. 293 (1963). Under settled precedent, remand for an evidentiary hearing is required.

The pertinent allegations in Mr. Duest federal habeas petitions were:

> The Broward County Sheriff's Department took a statement from Neil O'Donnel, the bartender at the bar where the victim allegedly left with another man. According to the State's theory, the man with whom the victim left the bar was Mr. Duest using the name "Danny". Pre-trial, Mr. O'Donnel told a detective that he only heard the name "Danny" from an anonymous witness. This statement was never provided to defense counsel. Then, at trial, Mr. O'Donnel testified that he had heard the unknown man himself use the name Danny. This permitted the State to present inadmissible hearsay as fact without affording the defendant the opportunity to cross-examine the witness who actually made the statement. Moreover, O'Donnel's trial testimony was misleading and false, in violation of Giglio, supra. No evidentiary hearing occurred as to this point in state court.
>
> Another witness at the bar told the detectives that the man who had been at the bar had bushy hair, had been there the last three nights and the victim seemed to know him. This statement was not disclosed. In fact, Danny had only been in town for two nights and is described as having a military haircut. The alleged identification of Lloyd Duest as "Danny" was the central issue in the case. This evidence was critical in enabling the judge and jury to evaluate that evidence both as to guilt-innocence and at the penalty phase. The failure to disclose this evidence was a violation of due process. No evidentiary hearing was allowed as to this point in state court.
>
> The detectives interviewed Michael DiMizio regarding "Danny". Mr. DiMizio advised them that Danny had the Camaro between 2:00 and 2:30 p.m. although it could have been later. This was exculpatory evidence for Mr. Duest: even if the jury did believe that Mr. Duest was "Danny", Dimizio's statement to the police indicated that Danny had a Camaro before the victim left the bar instead of after. This statement was contrary to Mr. Dimizio's trial testimony. No evidentiary hearing was conducted on this point in

state court.

* * *

Again, Dugan's statement contradicted testimony offered by the State at trial, and was thus exculpatory. The failure to provide it to the defense was error. No evidentiary hearing was conducted on this point in state court.

* * *

Robert Harris was a friend of the victim. He stated to detectives that the victim was in excellent physical shape and worked out at a gym. He also told the detectives that the victim cared for his roommate David but that David did not care as much for the victim. This was important exculpatory evidence for Mr. Duest in that: (1) the roommate was a suspect in the investigation; (2) the roommate gave contradictory statements to detectives and at trial as to a two hour time differential for when he arrived home; (3) the roommate had put clothing in the dryer shortly before the police arrived; and (4) a detective stated that the victim's blood was "fresh" four hours after the time when the State alleged he had been killed by "Danny." The State also tried to prove that the victim possessed valuable jewelry when Robert Harris had told the detectives that the victim had trouble making ends meet financially and was selling his house due to financial problems. All of this was exculpatory evidence not turned over to the defense. No evidentiary hearing was conducted on this point in state court.

Related to these issues was the report of the first detective on the scene that the blood was "fresh" four hours after the murder had been committed according to the State's theory at trial. The timing was critical in that "fresh blood" indicated that "Danny" could not have been the murderer since the roommate had already been home for hours. This was exculpatory evidence that was suppressed by the State at trial. Another related issue was DiMizio's report that Danny said he took $15,000 worth of jewelry. Again, this was impossible according to the suppressed statement of Robert Harris that the victim was in financial trouble and with the roommate's trial testimony that neither he nor the victim had any jewelry of particular value. No evidentiary hearing was conducted on this point in state court.

At trial the prosecution featured the fact that a

> pack of Marlboro cigarettes was found at the scene and presented witnesses to testify that Mr. Duest smoked Marlboro cigarettes. What the State did not reveal to the defense or the jury was that the package of cigarettes was not found until two days after the offense. Again this would have been important evidence for the jury to consider in weighing the value of the circumstantial evidence. The State also failed to disclose police reports inconsistent with the trial testimony regarding Mr. Duest's alleged statement that he had never committed murder before. No evidentiary hearing was conducted on this point in state court.
>
> The prosecution's suppression of evidence favorable to the accused violated due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S. Ct. 3375 (1985). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, supra. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d at 1542.

Judge Ryskamp denied an evidentiary hearing on these claims, saying:

> Duest raised these issues on December 17, 1989, in a supplement to his motion to vacate judgment and sentence. (claim N). On January 4-5, 1990, at the hearing before the state judge, counsel for Duest made no mention of these claims, but confined his argument to the bus ticket issue. Transcript at 228-38. Duest neither produced nor requested the production of the alleged exculpatory statements he claimed the state withheld. Counsel for Duest never asked for a hearing on these issues.

(R. 4-65-15).

Judge Ryskamp was in error. In state court, Mr. Duest's Brady claim was supplemented. The final version of the claim appeared as Claim N of the Supplemental Motion to Vacate. On January 4, 1990, the State circuit court ruled that evidence

would be received only on the bus ticket and not on any other aspect of the claim:

> THE COURT: Number 10 is supplemented also; is that right?
>
> MR. McCLAIN: Yes, your Honor.
>
> THE COURT: That's the long supplement. Okay.
>
> MR. McCLAIN: Your Honor, just for clarification on Claim N, then, evidence regarding the bus ticket?
>
> THE COURT: Yes, I will take it on the bus ticket.
>
> I don't need it on the statement from Neal O'Donnel. O-D-o-n-n-e-l. One L. Or on Mr. DiMizio. D-i-M-i-z-i-o. And Tammy Dugan, D-u-g-a-n, don't need any testimony on that or from Robert Harris. Or on the cigarette package. I think that's it.

(PC R. 20).

Judge Ryskamp's disposition was premised upon his erroneous belief that Mr. Duest did not seek an evidentiary hearing in state court. Mr. Duest requested the opportunity to present the evidence, but the State circuit court refused to permit presentation of evidence regarding all aspects of Mr. Duest's Brady claim. Accordingly, evidentiary development is required. The district court's contrary holding must be reversed.

ARGUMENT VI

LLOYD DUEST WAS DEPRIVED OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE HE WAS NOT PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738,

744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures . . . ." *Lucey*, 469 U.S at 394 n.6.

Appellate counsel here failed to act as an advocate for his client. As in *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987), the issues presented in this petition: 1) "leaped out" on even a casual reading of the record; 2) involved *per se* reversible error; and 3) were incomprehensibly ignored. Counsel ineffectively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in *Matire*, Mr. Duest is entitled to relief. The "adversarial testing process" failed during Mr. Duest's direct appeal -- because counsel failed. *Matire* at 1438, *citing* *Strickland v. Washington*, 466 U.S. 668, 690 (1984). An evidentiary hearing is required on this issue.

When Mr. Duest appealed his judgment and sentence to the Florida Supreme Court on direct review, his appellate counsel submitted a woefully inadequate brief that was incomprehensible and failed to brief substantial issues. Moreover, Mr. Duest's appellate counsel was found to have provided ineffective assistance of counsel in a contemporaneous appeal. *See* *Wilson v. Wainwright*, 474 So. 2d 1163 (Fla. 1985).

Here, appellate counsel did not raise on direct appeal the following issues: 1) the introduction of flight evidence, 2) the introduction of collateral misconduct, 3) the sentencing court's failure to consider and list the nonstatutory mitigation presented at the penalty phase, 4) the sentencer's erroneous

placement of a burden upon Mr. Duest to show mitigation outweighed aggravation, 5) the introduction and consideration of nonstatutory aggravating factors and 6) the erroneous jury instruction that the jury could not return a 6-6 verdict in the penalty phase.

An evidentiary hearing is required on claims of ineffective assistance of appellate counsel where the allegations accepted as true establish a basis for relief. Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987). The district court in denying relief had to speculate that appellate counsel may have made strategic decisions. ("Duest's appellate counsel could have concluded, in good faith, that the issue did not merit appeal." R3-65-46). The district court erroneously denied relief on this claim without benefit of an evidentiary hearing. A reversal is warranted.

ARGUMENT VII

MR. DUEST'S CONVICTION VIOLATES DUE PROCESS OF LAW BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVINCE ANY RATIONAL TRIER OF FACT OF HIS GUILT BEYOND REASONABLE DOUBT.

Mr. Duest's conviction of first-degree murder could have been predicated upon the jury finding either premeditated or felony murder. If either basis was unconstitutional, the conviction cannot stand. Stromberg v. California, 287 U.S. 359 (1931). It violates due process of law to convict an individual when no rational finder of fact could find him or her to be guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). If no rational finder of fact could have found Mr.

Duest guilty of premeditated first-degree murder beyond a reasonable doubt, then his first-degree murder conviction must be reversed.

The standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia, 433 U.S. 307 (1979):

> [T]he applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

This Court must view the evidence in the light most favorable to the prosecution. "If the reviewing court is convinced by the evidence only that the defendant is more likely than not guilty, then the evidence is not sufficient for conviction." Cosby v. Jones, 682 F.2d 1373, 1379 (11th Cir. 1982). See also County Court of Ulster County v. Allen, 442 U.S. 140 (1979). "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain reasonable doubt." Cosby, 682 F.2d at 1383. It is certainly at least as likely that the victim's death resulted from an argument or heat of passion as that the shooting was premeditated. The evidence was insufficient to support premeditation, and Mr. Duest's conviction thus violates due process. Relief is proper.

ARGUMENT VIII

THE SENTENCING JURY RECEIVED INSUFFICIENT INSTRUCTIONS AT THE PENALTY PHASE IN VIOLATION OF HITCHCOCK V. DUGGER.

In Florida, a capital jury acts as a sentencer in the penalty phase since its factual determinations are binding so long as a reasonable basis exists. In fact, that was the holding in Hitchcock v. Dugger, 481 U.S. 393 (1987), where the Supreme Court held that a Florida jury must receive instructions which comply with the eighth amendment. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct. 1353 (1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989).[17]

The jury was not told in Mr. Duest's case what was required to establish the "heinous, atrocious or cruel" aggravating circumstance. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Mr. Duest's jury was not advised of

---

[17] The district court found this claim procedurally barred because it should have been raised on direct appeal. However, the procedural bar is not "adequate" under Johnson v. Mississippi, 108 S. Ct. 1981 (1988). The Florida Supreme Court has held that Hitchcock was a change in law which made a Florida jury a sentencer entitled to accurate instructions. Accordingly claims premised upon Hitchcock were not procedurally barred. Hargrave v. Dugger, 832 F.2d 1528, 1539 (11th 1987)(in banc)(Tjoflat, concurring). At the time of Mr. Duest's trial and direct appeal, Hitchcock was not the law. Jury instructional error was considered cured so long as the judge followed the law in imposing sentence. Mikenas v. State, 407 So. 2d 892, reversed (post-Hitchcock); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988). In fact, Mr. Duest did challenge the trial court's finding of these aggravating factors on direct appeal. However, at that time he had no basis for challenging the jury instructions. Prior to Hitchcock, instructional error did not matter. The Florida Supreme Court gave all death row inmates until July, 1989, to file Hitchcock claims. Mr. Duest timely filed his claim in his 3.850 motion. The district court erred in concluding that the Florida Supreme Court would have applied an "adequate" bar.

the limitations on the "heinous, atrocious or cruel" aggravating factor (R. 1216). As a result, the instructions failed to limit the jury's discretion and violated Hitchcock and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Similarly the jury received inadequate instructions regarding "cold, calculated and premeditated." This aggravating factor requires proof of heightened premeditation as evidenced by a pre-arranged plan. Rogers v. State, 511 So. 2d 526 (Fla. 1987). However the jury received no guidance as to the necessary elements of the aggravating factor. Again, this violated Hitchcock and Maynard.

Where an aggravating factor is struck in Florida, a new sentencing must be ordered unless the error was harmless beyond a reasonable doubt. White v. Dugger, 565 So. 2d 700 (Fla. 1990). Error before a sentencing jury must be reversed where the record contained evidence upon which the jury could reasonably have based a life recommendation. Hall v. State, 541 So. 2d at 1128 ("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."). Mitigation was before the jury which could have served as a reasonable basis for a life recommendation. Mr. Duest is entitled to relief under the standards of Maynard v. Cartwright and Hitchcock v. Dugger.

ARGUMENT IX

MR. DUEST WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE STATE INTRODUCED EVIDENCE OF FLIGHT AND EVIDENCE OF

MR. DUEST'S USE OF AN ALIAS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The reference to flight and/or an alias used by a criminal defendant inserts into the trial impermissible factors for the jury's consideration and deprives the defendant of a fair trial. The reference to this type of evidence suggests that the defendant has something to hide and is introduced to argue guilty knowledge. In order to be admissible, evidence must be relevant. Evidence of flight and use of aliases may be admissible when relevant to establish guilty knowledge. However, even then the evidence must be excluded where the "probative value is substantially outweighed by the danger of unfair prejudice." Section 90.403 of the Evidence Code.

Here the prosecution introduced Mr. Duest's use of an alias and evidence of his flight as evidence of his guilt. At the same time, evidence that Mr. Duest had another reason for concealing his identity and fleeing was kept from the jury. The jury did not know that Mr. Duest was wanted in Massachusetts. The jury was falsely led to believe that Mr. Duest's only motive for using an alias on April 18, 1982, was his guilt of the homicide on February 15, 1982. The jury was also led to believe that Mr. Duest fled the police station because he knew he had committed the murder and was going to be caught. The introduction of such evidence constituted plain error under United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983), which impinged upon the fundamental fairness of the trial. Cf. Johnson v. Mississippi, 108 S. Ct. 1981 (1988)(consideration of materially inaccurate

evidence violated eighth and fourteenth amendments).

At least to a person who knows that Mr. Duest was wanted for escape in Massachusetts, the evidence of the use of an alias and of flight does not tend to prove guilty knowledge of murder because the conduct is just as likely the result of being wanted for escaping Massachusetts while awaiting trial for six (6) counts of cocaine possession and thirty one (31) counts of larceny by check. When the defense sought to suppress this evidence before trial, the court recognized that the flight could have occurred because "he was afraid they were going to find out he had a capias from Massachusetts" (R. 37). Despite this recognition, however, the judge ruled the evidence was admissible. This was fundamental error.

In Merritt v. State, 523 So. 2d 573 (Fla. 1988) the Florida Supreme Court stated:

> Flight evidence is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. . . . However, flight alone is no more consistent with guilt than innocence.

In Merritt, the evidence of flight was inadmissible because the escape occurred well after the murder, not within days, and because the defendant was also facing unrelated charges, although he knew he was under investigation for murder. Merritt, 523 So. 2d at 573-74.

The facts here are virtually identical with those in Merritt. Here, as in Merritt there is no evidence that flight occurred to avoid prosecution for the murder. At the time Mr.

Duest was arrested, he was already using an alias, which is very consistent with trying to avoid prosecution in Massachusetts. The flight occurred more than two months after the homicide, not days after. Mr. Duest was stopped on the street and taken to the police station without making any effort to run, even after the police had informed Mr. Duest he was "a possible suspect in a homicide" (R. 844). Mr. Duest voluntarily went with the police, was not placed under arrest, and was not handcuffed. Id. Mr. Duest was told Massachusetts authorities had been contacted and that "he was, in fact, under arrest for the warrants in Massachusetts, at which time he replied, 'I was afraid you were going to find out about those'" (R. 882). Mr. Duest fled only after he was fingerprinted (Feltgen depo at 18). Certainly, the fingerprinting caused Mr. Duest to know that his true identity would soon be discovered. Under the circumstances, it is the "sheerest of speculation" to conclude his flight was premised upon his guilt of the murder and not upon nearly forty (40) charges pending against him in Massachusetts.

Despite the defense's strenuous objection, testimony was elicited from the arresting police officer that he left Mr. Duest in an interrogation room and that when he returned, Mr. Duest was gone, the arm of the chair to which Mr. Duest had been secured was broken, and Mr. Duest was not apprehended for four or five hours (R. 883). The prosecutor argued in closing that Mr. Duest was guilty of the murder and "that is why he ran out of there" (R. 1448). "All the man had to do was say I am not Bobby Brigida

and then he would be clear." *Id*. He also asked other witnesses if they had hid in a closet (R. 514), which is where Mr. Duest was later apprehended. The prosecutor's statement was a blatant lie. He knew that Mr. Duest could not have just said he was not Robert Brigida and walked away. The prosecutor knew that to accomplish that Mr. Duest would have to prove his true identity which would have led to nearly forty (40) outstanding charges in Massachusetts. The prosecutor knew the jury did not know this and knew that defense counsel could not and would not explain his way out of this corner by introducing evidence of such an extensive criminal record.[18]

Finally, this case represents a classic example of ineffective assistance of counsel, not only because of counsel's deficient performance, but also because, although defense counsel objected, circumstances beyond counsel's control prevented counsel from ensuring a fair adversarial testing. The sixth and fourteenth amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also* *United States v. Cronic*, 466 U.S. 648, 656-57, 659-60 (1984); *Perry v. Leeke*, 109 S. Ct. 594 (1989).

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[18] The prosecutor's argument thus violated *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny. When the State presents false and misleading evidence or argument, the defendant is entitled to relief if there is "any reasonable likelihood" that the testimony or argument "could have" affected the verdict. *United States v. Bagley*, 105 S. Ct. 3375, 3382 (1985).

Here, defense counsel was constrained by the trial court's ruling. As noted in Merritt, such a ruling put counsel "between a rock and a hard place." 523 So. 2d at 574. There was no adversarial testing. Counsel's performance was rendered ineffective and deficient, against counsel's own wishes. Where there is no adversarial testing, prejudice is presumed. Accordingly, a new trial must be ordered.

ARGUMENT X

TRIAL COURT COMMENTS AND INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT HAD TO BE RENDERED BY A MAJORITY OF THE JURY MATERIALLY MISLEAD THE JURY AND CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Under Florida's capital sentencing scheme, a jury's recommendation that the death penalty be imposed need not be unanimous, but may be made by a majority. If a majority does not vote for death, the jury's recommendation is life; thus, if the jury's vote is split six to six, the jury has recommended life, and the defendant is entitled to that verdict. See Rose v. State, 425 So. 2d 521 (Fla. 1983); Harich v. State, 437 So. 2d 1038, 1086 (Fla. 1983). During the proceedings resulting in Mr. Duest's sentence of death, judicial comments and instructions deprived him of that right. The jury panel was informed by the court and the prosecution during voir dire that the sentencing recommendation, whether for life or death, must be made by a majority vote (R. 84-85, 86-87). The jury instructions also reflected this misunderstanding of the law (R. 1628-30). Defense counsel objected, but the court refused to correct the

instruction (R. 1630-31).

It is clear that Mr. Duest's jury was improperly instructed. In Florida, a 6-6 jury vote is a life recommendation. Rose; Harich. It is equally clear that this misinformation had an effect upon the jury's recommendation: before the jury reached its 7 to 5 death verdict, it asked to view the evidence of Mr. Duest's prior convictions. Such action is perfectly consistent with an effort to resolve a deadlock.

When jurors receive misinformation, the State must demonstrate that the error had no effect on the sentence. Caldwell v. Mississippi, 472 U.S. 320 (1985). The State cannot do so here, where the jury reached a 7 to 5 decision and required the repetition of evidence before reaching that decision. Relief is proper.

ARGUMENT XI

MR. DUEST'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. DUEST TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE EMPLOYED THIS IMPROPER STANDARD.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and State v. Dixon, 283 So. 2d 1 (Fla. 1973), for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In sc instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing

termination, thus violating Caldwell v. Mississippi, 472 U.S. 0 (1985); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); and ynard v. Cartwright, 108 S. Ct. 1853 (1988). The Florida preme Court has refused to allow such burden shifting. See, xon; Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989).

Mr. Duest's jury was unconstitutionally instructed and was esented with burden-shifting argument by the prosecutor (R. 72, 1590, 1606, 1625-26). As a result, Mr. Duest was constitutionally required to prove why he should be allowed to ve. Trial counsel ineffectively failed to properly litigate is issue at trial. An evidentiary hearing and relief are oper.

CONCLUSION

The district court erred in many critical respects, and its der should be reversed. The facts have not been fully, fairly, d properly developed, and a remand for proper evidentiary solution is appropriate. Mr. Duest is entitled to the habeas rpus relief he seeks and the writ should issue.

I HEREBY CERTIFY that a true copy of the foregoing motion s been furnished by United States Mail, first class postage epaid, to all counsel of record on July 3, 1991.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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IN THE UNITED STATES COURT OF APPEAL

ELEVENTH CIRCUIT

CASE NO. 90-6009

LLOYD DUEST,

Appellant,

vs.

HARRY K. SINGLETARY, Secretary
Florida Department of Corrections,

Appellee.

****

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

****

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John Pope: deceased victim

The Honorable Kenneth L. Ryskamp
United States District Court Judge for the Southern District of Florida

Harry K. Singletary: Appellee

Celia A. Terenzio, Esquire: Attorney for Appellee

PRELIMINARY STATEMENT

Appellee will utilize the identical references as outlined in appellant's brief.

STATEMENT REGARDING PREFERENCE

This appeal is entitled to preference pursuant to 28 U.S.C. Section 2254, by the United Statesd District Court for the Southern District of Florida.

STATEMENT REGARDING ORAL ARGUMENT

This case represents one undertaken from a conviction of first degree murder and sentence of death. Oral argument is necessary to a clear understanding of the issues presented.

STATEMENT OF JURISDICTION

This is an appeal from the district court's order denying relief on a petition of habeas corpus. This Court's jurisdiction rests on 28 U.S.C. Section 2253.

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II.

WHETHER THE DISTRICT COURT ERRED IN FINDING HARMLESS ERROR IN APPELLANT'S SENTENCING PROCEDURE SINCE A VIOLENT PRIOR FELONY USED TO SATISFY AN AGGRAVATING FACTOR WAS SUBSEQUENTLY VACATED

III.

WHETHER THE DISTRICT COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE, AND WHETHER THIS DETERMINATION WAS PROPERLY MADE WITHOUT A SECOND EVIDENTIARY HEARING

IV.

WHETHER THE DISTRICT COURT ERRED IN NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR HIS FAILURE TO OBJECT TO ALLEGED IMPROPER PROSECUTORIAL COMMENTS AND ARGUMENTS, AND WHETHER THIS DETERMINATION WAS PROPERLY MADE WITHOUT AN EVIDENTIARY HEARING

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VII.

WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A CONVICTION FOR FIRST DEGREE MURDER

VIII.

WHETHER THE DISTRICT COURT ERRED IN FINDING THAT CHALLENGES TO TWO JURY INSTRUCTIONS REGARDING AGGRAVATING FACTORS WAS PROCEDURALLY BARRED FORM FEDERAL REVIEW

IX.

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X.

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XI.

WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE SENTENCING JURY INSTRUCTIONS DO NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO THE APPELLANT TO DEMONSTRATE THAT DEATH IS NOT THE APPROPRIATE PENALTY

STATEMENT OF THE CASE

A. Statement of the facts.

Appellee would rely on the facts as found by the Florida Supreme Court regarding the circumstances of the crime as outlined in the direct appeal opinion at Duest v. State, 462 So.2d 446, 448-49 (Fla. 1985).

Other relevant facts for purposes of this appeal are as follows;

The absence of the bus ticket related to appellant's Brady claim was found to have been inadvertent. (PC.R. 190-204, 208-218).

No repeated reference was made to the prior violent felony relied upon by the state to prove the existence of an aggravating factor. (R. 1591-1592).

Mr. Baron, trial counsel, testified that he interviewed appellant and his family for possible mitigating evidence. He made a tactical decision not to utilize a psychological report in the penalty phase due to the negative impact of that report. (PC.R. 155, 157, 158, 175, 178). Much of the "new" information provided by the family members is cumulative as to what was actually presented at the penalty phase. (R. 1578-1579, 1620, 1623).

The prosecutor's comments during closing arguments were permissible comments on the evidence. The jury was repeatedly told that they were the final judges of the credibility of the

witnesses. They were also told that they must decide the weight to be given to the testimony. (R 1397-1398, 1404, 1409, 1423, 1426, 1454).

B. Standard of review.

This Court must accept the implicit factual findings regarding appellant's ineffective assistance of counsel claim made by the Florida courts following a full and fair evidentiary hearing under 28 U.S.C. Section 2254 (d). However, the legal conclusion regarding the claim is a question of law and no such presumption is attached.

Appellee accepts as correct appellant's statement regarding the standard of review for the Brady claim and the Johnson v. Mississippi claim.

Regarding the remaining claims were no evidentiary hearing was held, such was not required were the claims were either not cognizable for habeas review, there was no showing that relief should be granted, or the issues were resolved based on the record before the court.

A determination regarding the validity of the procedural bar is a question of law and review is de novo.

SUMMARY OF THE ARGUMENT

1. The inadvertent failure to disclose the existence of a bus ticket did not amount to a Brady violation. The bus ticket was not material since it only corroborated an irrelevant fact. The fact that the ticket may prove that appellant was in Boston on April 5, 1982, does nothing to disprove that he was in Fort Lauderdale, the weekend of February 15, 1982, the time that the victim was killed.

2. Two prior violent felonies were used to prove the aggravating factor of prior violent felony. One was armed robbery and the other was armed assault with the intent to commit murder. Both felonies arose out of the same incident. The convictions were read to the sentencing jury. During their deliberations they asked to see the judgements regarding those convictions. The prosecutor's closing argument did not place great emphasis on the conviction that was ultimately overturned. Subsequent to the direct appeal the armed assault was vacated. The aggravating factor was still valid however, due to the remaining armed robbery, any error must be considered harmless.

3. Appellant received effective assistance of counsel at the penalty phase. He alleges that trial counsel failed to conduct an adequate investigation into available mitigating evidence. The "new evidence" proffered to demonstrate trial counsel's deficient performance is either cumulative to what was already presented, in total contradiction to what was actually presented, or would have opened the door to damaging evidence

regarding appellant's extensive criminal past and unflattering psychological profile.

The district court properly denied relief without a second evidentiary hearing. Implicit factual findings are acertainable from the state court proceedings. Furthermore, even if such findings were not readily apparent, the remedy would not be a second evidentiary hearing. This is especially so given the fact that appellant has not even challenged the procedure/process of the state court hearing under 28 U.S.C. Section 2254 (d) (1-7). The district court correctly articulated factual findings from the state court hearing in support of the both the state and district's courts determination that counsel was effective.

4. Appellant has failed to establish that he received ineffective assistance of counsel for counsel's failure to object to alleged improper prosecutorial comments. The comments were either permissible comments on the evidence, proper rebuttal, or relevant to establish the existence of aggravating factors. To the extent that any such comments were impermissible, they are harmless error. Consequently trial counsel was not ineffective for failing to object to any of the remarks.

5. Appellant was not entitled to an evidentiary hearing regarding the remainder of his Brady claim since he could not establish the required materiality of the "withheld evidence". Appellant has also failed to establish that he was unable to obtain the evidence irrespective of due diligence.

6. Appellant has not demonstrated that he received ineffective assistance of appellate counsel. The six issues appellant claims should have been raised on direct appeal, were either without merit or not properly preserved for appeal. The district court properly denied relief without an evidentiary hearing given the fact that resolution of this issue was possible from the record already before the court and appellant was unable to establish prejudice.

7. There was more than sufficient evidence to sustain appellant's conviction for first degree murder.

8. Appellant's constitutional challenge to the "heinous atrocious and cruel" and the "cold, calculated, and premeditated aggravating factors is procedurally barred from federal review. Appellant has failed to establish cause and prejudice required to overcome his irrevocable procedural default. In the alternative this Court has upheld application of both these factors.

9. Appellant's constitutional challenge to the admissibility of collateral bad acts is procedurally barred from federal review. Appellant has failed to plead let alone establish cause and prejudice to warrant federal review of this defaulted claim. In the alternative, appellant cannot demonstrate that evidence of his prior escape and subsequent use of an alias violates any constitutional right or deprive him of a fair trial.

10. Appellant's constitutional challenge to the jury instruction regarding the number of votes required to recommend a

life sentence is procedurally barred as the Florida Supreme Court would have so found if the claim was properly presented in his post-conviction appeal. Appellant has failed to plead let alone establish the cause and prejudice requirement needed to overcome the default.

11. Jury instructions regarding Florida's capital sentencing scheme, do not impermissibility shift the burden to the defendant to prove that death is not the appropriate sentence.

I.

APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL AS NO MATERIAL EVIDENCE WAS WITHHELD IN VIOLATION OF BRADY V. MARYLAND, NOR WAS ANY FALSE OR MISLEADING EVIDENCE EVER INTRODUCED.

Appellant claims that the state withheld exculpatory evidence in violation of the constitutional principles announced in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically appellant claims that the state withheld the existence of a bus ticket reflecting that someone (the bus ticket does not have a name on it indicating to whom it belonged) traveled from Boston to Ft. Lauderdale on April 5, 1982. The bus ticket was never given to the defense and was discovered several years later pursuant to a public records request under Florida law. (R 190-204).

The district court properly concluded that the bus ticket was not material evidence. True Brady evidence requires a showing that the evidence was material to guilt or punishment, irrespective of the state's good or bad faith. Brady, 373 U.S. at 87. Evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different." United States v. Bagley, 473 U.S. 667, 682 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985). Appellant cannot establish that, had the bus ticket been introduced, he would have been acquitted of murder.

Appellant's defense was that he was in Massachusetts at the time of the murder. The murder occurred the weekend of February 15, 1982. In order to bolster his alibi defense appellant's parents testified at trial that they brought appellant to the bus station in Boston on April 5, 1982. The existence of the ticket at best simply corroborates testimony regarding an irrelevant fact. The fact that appellant was in Boston on April 5, 1982 in no way whatsoever negates the evidence presented by the state that he was in Florida forty-nine (49) days before that, the time of the murder. Duest v. Dugger, 555 So.2d 849, 850 (Fla. 1990).

The fact that the bus ticket lends credibility to appellant's parents does not establish materiality. Several other witnesses for appellant testified that he was in Massachusetts that weekend in February. One of the witnesses produced a sales receipt that allegedly showed that appellant was in his store that February weekend. Given the jury's verdict those witnesses were also found not to be credible. The jury chose to believe the testimony of seven state witnesses who stated that appellant was in Ft. Lauderdale the weekend of the murder.

Also without merit is appellant's allegation that the state withheld evidence or intentionally presented false information regarding the existence vel non of the bus ticket. The district court correctly relied on the factual findings of the Florida Supreme Court that the absence of the ticket was

inadvertent and not intentional. The record more than supports this finding. (P.C.R. 190-204, 208-218). In conclusion the district court's order denying relief should be upheld.

II.

THE SUBSEQUENT INADMISSIBILITY OF A PRIOR CONVICTION USED TO SATISFY AN AGGRAVATING FACTOR DID NOT RESULT IN AN UNCONSTITUTIONAL SENTENCE AS THERE REMAINED SUFFICIENT EVIDENCE TO SUSTAIN THE EXISTENCE OF THAT AGGRAVATING FACTOR

The State relied on two prior violent felonies, armed robbery and armed assault with intent to commit murder, to prove the existence of the aggravating factor that appellant had previously been convicted of a prior violent felony under Section 921.141 (5)(b) Fla. Statutes (1985). Subsequent to appellant's direct appeal, the conviction for armed assault was vacated. Appellant claims that his sentence of death cannot stand based on Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). In conformity with Florida case law, the state trial court, the Florida Supreme Court and the district court all determined that any error that may have occurred must be considered harmless since there still remained evidence to sustain the finding of this aggravating factor. (65-18-19). Duest v. Dugger, 555 So.2d 849 (Fla. 1990). Preston v. State, 564 So.2d 120, 123 (Fla. 1990); Daughtery v. State, 533 So.2d 287, 289 (Fla. 1988). Consequently, the balancing process regarding the aggravating and mitigating factors remained unchanged. Furthermore absent the aggravating factor regarding the prior violent felony, there still remained three valid aggravating factors. Duest, 555 So.2d at 851. (65- 18). Lastly, contrary to the facts in Johnson, supra, the prosecutor in the

instant case did not repeatedly emphasize this prior felony. (R 1591-1592). The indictments for both felonies were read to the jury. During deliberations the jury requested that they be read again.(R 1631-1633). That was all that was done, no other reference was made.

All the cases relied upon by appellant regarding his challenge to the harmless error finding are based on a violation of Hitchcock v. Dugger, 481 U.S. 383 (1987) which involves what impact mitigating evidence, not previously considered, would have in a sentencing determination. Appellee contends that this analysis is faulty as the emphasis should be on what effect the absence of an aggravating factor has on the balancing process between aggravating and mitigating factors. Appellant's argument stresses the importance of the mitigating evidence and fails to discuss or challenge the strength of the aggravating factors that still remain.[1] The harmless error analysis conducted by the Florida courts and the district court was appropriate. Clemons v. Mississippi, 494 U.S. __, 108 L.Ed.2d 725, 741, 110 S.Ct. __. (1990); Kennedy v. Dugger, 5 FLW Fed. C990, 992-993 (11th Cir. May 31, 1991).

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[1] Appellant makes repeated reference to an alleged concession by the state concerning the presentation of mitigating evidence. The statement that there was plenty of nonstatutory mitigating evidence presented at trial was made in the context of rebutting a claim the trial judge failed to consider same. (PC. R. 117-121). The word plenty was meant to describe the quantity of nonstatutory evidence, and had nothing to do with the quality or credibiltiy of such evidence.

A review of the record indicates that the Florida courts and the district court's determination that consideration of the vacated conviction was harmless error should be upheld by this court. Daughtery.

III.

APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL

Appellant claims that his trial attorney failed to conduct an adequate investigation into possible mitigating evidence. He further alleges that his failure to obtain and utilize school, medical, and prison records, and his failure to call as a witness any psychologist resulted in an inadequate presentation at the sentencing phase. The district court, after reviewing the record including the state evidentiary hearing regarding this matter, concluded that trial counsel's decisions were tactical and reasonable.(65- 41-42).

A. APPELLANT HAS FAILED TO DEMONSTRATE WHY A SECOND EVIDENTIARY HEARING IS REQUIRED

Appellant alleges that a second hearing is required because the Florida courts failed to make explicit factual findings. He further contends that the district court erred in making its factual findings without the benefit of another hearing. Appellant is incorrect on both counts.

State court finding of facts may be either explicit or implicit. Green v. Zant, 715 F.2d 551, 557 (11th Cir. 1983). In the instant case appellant claims that trial counsel failed to conduct an adequate investigation into possible mitigating evidence, including mental health evidence via a psychologist. Even when the legal principle involved has not been articulated, the federal courts can assume that the proper legal standard was

used. Green v. Zant, 715 F.2d at 557. It is well settled that the correct legal standard to be used when resolving claims of ineffective assistance of counsel is that of Strickland, consequently factual findings can be implied in the instant case.

The gravamen of appellant's claim is that trial counsel was deficient for failing to investigate possible avenues of mitigation. Those alleged avenues of mitigation would have resulted in a life sentence. Obviously testimony from the trial attorney regarding his efforts and strategy is at the heart of this claim. At the evidentiary hearing trial counsel testified regarding his efforts and why he chose a certain course of action over another one. The state courts findings are implicit in the legal determination that counsel was not ineffective. At the state hearing, trial counsel testified that he discussed the penalty phase evidence with appellant and his family. They in fact testified at sentencing. He also elicited the services of a psychologist, Dr. Ceros-Livingston. Her report was not admitted at trial because it was more harmful than helpful. It would have opened the door to further damaging evidence regarding appellant's extensive criminal past.

In support of his allegation, appellant produced a psychologist who had some differing opinions regarding appellant's psychological makeup. He also offered affidavits from various family members, some testified at the penalty phase some did not. For those who had testified at trial, portions of

their new statements were cumulative as to what was presented at trial. Other portions of their statements were in contradiction to their trial testimony.

Implicit in the Florida courts legal determination that trial counsel was not ineffective is the finding that trial counsel did investigate and discuss the case with appellant's family members. They in fact testified. He also made a tactical decision not to present the testimony of Dr. Ceros-Livingston. Such findings are permissible and are clearly supported by the record. Marshall v. Lonberger, 459 U.S. 422, 433-434 (1983).

Also without merit is appellant's claim that the district court impermissibly relied on the state record to make explicit factual findings. Appellant claims that the district court has no authority to review the state court hearing and make explicit findings therefrom. If a federal court is allowed to reassess a state court determination from the state record because the findings implicit or explicit, are not supported by the record, then a federal court can certainly assess a state record which is in conformity with the state court determination. Marshall, 459 U.S. at 433. Appellant's only argument to support a claim that another hearing should be held is that the Florida courts did not make explicit factual findings. There has been no attack on the fact finding procedure or process of the state hearing as enumerated under 28 U.S.C. Section 2254 (d) (1-7). It is simply illogical, wasteful and unnecessary to conduct a second evidentiary hearing when there has been no attack on the

first one let alone any finding that the hearing was in any deficient. The United States Supreme Court has held that factual findings can be made by an appellate court. Sumner v. Mata, 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722, 731 (1981). If that is true, an appellate court has obviously not heard the evidence either, than what would prevent the federal district court from doing so? In conformity with federal comity, the district court's factual findings were consistent with the implicit findings made by the state courts. What appellant is really complaining about is that the disputed facts were not resolved in his favor by either the state or federal courts. Furthermore, since there is not even an allegation that the factual findings are not supported by the record the findings must be upheld. Sumner.

B. APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL

Appellee asserts that appellant has failed to establish that he has received ineffective assistance of counsel as guaranteed by the sixth amendment. Under the applicable standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) appellant must show that "in light of all the circumstances, the identified acts of omissions were outside the range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Second he must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694, 104 S.Ct. at 2068. Appellant has failed to establish either requirement.

At the evidentiary hearing regarding this matter, appellant presented affidavits of family members (including those who did in fact testify at the penalty phase) and the live testimony of Dr. Fleming. Appellant asserts that a comparison of the mitigating evidence now presented with the evidence that was in fact admitted at trial, supports his claim of ineffectiveness. Appellant's argument is legally flawed. As this court has stated before, "the appropriate legal standard is not error-free representation, but 'reasonableness in light of all the circumstances, applying a heavy measure of deference to counsel's judgments'. Foster v. Dugger, 823 F.2d 402, 405, f.n.10 citing to Strickland (11th Cir. 1987). The analysis is based on what the trial attorney knew at the time including those facts and circumstances which formed the basis of his decision. Foster.

At the evidentiary hearing appellant's trial attorney, Mr. Baron testified that he did engage the services of a psychologist, Dr. Ceros-Livingston. He impressed upon her the need to know everything about appellant's background regarding possible mitigating evidence. (PC.R. 175). Mr. Baron made a tactical decision not to call Dr. Livingston as her report was more damaging than helpful. (PC.R. 155,157,175,178). The jury would have heard that appellant had a long and involved prison record, including several burglaries, breaking and entering convictions and robberies. In all appellant has been convicted of 28 prior felonies. Appellant told Dr. Livingston that all of the prior crimes were justified. He has escaped from prison

twice before, and he still presents a security risk as he would escape again if given the chance. He has homosexual tendencies, no real possibility of change and always takes what he wants as he is unable to delay gratification. Given this information, Mr. Baron's decision not to present this type of mitigating evidence was reasonable. Smith v. Dugger, 840 F.2d 787, 795 (11th Cir. 1988).

Appellant's reliance on Dr. Fleming's report does nothing to undermined Mr. Baron's actions. First of all counsel is not required to shop around for a psychologist until he finds one that will testify a certain way. Elledge v. Dugger, 823 F.2d 1439, 1447, f.n.17 (11th Cir. 1987). Secondly Dr. Fleming's report would also have opened the door to evidence of appellant's extensive criminal past including his past felonies, his prior escapes and that he was caught in prison with a weapon. (PC. R. 157-158, 170,90). Given the negative impact of this information, appellant has failed to establish that trial counsel's performance was unreasonable. Smith, Burger v. Kemp, 483 U.S. 776, 97 L.Ed.2d 638, 107 S.Ct. 3114, reh. denied, 483 U.S. 1056, 97 L.Ed.2d 820, 108 S.Ct. 32 (1987). Finally to the extent that Dr.Fleming's report contradicts previous information concerning appellant's abusive childhood, such discrepancies or inconsistencies cannot be attributed to counsel's efforts. Whatever information was given to Mr. Baron and Dr. Livingston was provided by appellant and his family. (PC. R. 147-148). It is reasonable for trial counsel to rely on information received

from the defendant. Strickland, 466 U.S. at 691; Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985).

Appellant also relies on various affidavits submitted by family members which detail incidents of both physical and drug abuse. Again as stated above, these same family members did testify at trial, and portrayed appellant as a loving person who never had any mental problems but just got mixed up in the wrong crowd. (R. 1577-1587). Nothing was ever said about this alleged child abuse.

The remainder of the "new testimony" is simply cumulative. Consistent with their trial testimony was information regarding appellant's past drug history. (R.1578, 1620,1623). His father also testified regarding appellant's activities in prison where he helped counsel younger defendant's concerning drug abuse. The jury also heard how appellant assisted a prison guard with an injured inmate. (R. 1579). Although the evidence is more detailed it is still merely cumulative and does not warrant a finding that Mr. Baron's investigation or presentation was in any way deficient. Dobbs v. Kemp, 790 F.2d 1499, 1513 (11th Cir. 1986).

Finally appellant cannot establish that he was in any way prejudiced by the fact that this information was not presented at trial. Accounts of isolated incidents of troubled childhood experiences at school or at home, allegations of impoverished surroundings due to a lack of financial resources, stories regarding physical ailments, behavior problems as a

result of falling into the wrong crowd, unsuccessful teenage romances is simply not entitled to much mitigating weight, given the fact that appellant was thirty years old at the time of this crime. Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990). Furthermore since mitigating evidence is in the eye of the beholder, it is questionable that a jury would be sympathetic to appellant's illegal drug use or his extensive life of crime. Stanley v. Zant, 697 F.2d 955, 969-970 (11th Cir. 1983).

Appellant has failed to demonstrate that trial counsel's actions were not the result of reasonable trial strategy or that any information not presented would have changed the outcome of the proceedings. Strickland.

IV.

THE PROSECUTOR'S CLOSING REMARKS WERE PROPER, CONSEQUENTLY, TRIAL COUNSEL'S FAILURE TO OBJECT TO ANY OF HIS STATEMENTS DOES NOT DEMONSTRATE THAT APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant presents this court with various instances of alleged improper remarks made by the prosecutor during closing argument. The district court properly concluded that all of the remarks were either not improper or at best harmless error. [2]

Since resolution of this issue can be determined from the record already available, no evidentiary hearing was required. Hill v. Lockart, 731 F.2d 568, 572 (8th Cir. 1984) affirmed 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). An evidentiary hearing is not required when prejudice cannot be established. Agan v. Dugger, 835 F.2d 1337, 1338 (11th Cir. 1987).

In order to succeed on a claim of ineffective assistance of counsel, appellant must demonstrate that counsel was deficient for failing to object to any of the remarks and that the deficient performance resulted in prejudice to the defendant. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d

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[2] This claim was raised in appellant's motion for postconviction. The trial court found that the substance of the claim was procedurally barred for failure to raise it on direct appeal. The Florida Supreme Court determined that the claim was waived on appeal for failure to properly present the claim in appellant's initial breif. Duest v. Dugger, 555 So.2d 849, 851-852 (Fla. 1990). The district court determined that the Florida Supreme Court's procedural bar was not independent and adequate and addressed the merits. (65-7, 42-43).

674, 104 S.Ct. 2052 (1984). The district court properly denied relief.

Wide latitude is permitted in closing argument. Logical inferences can be drawn and counsel is allowed to advance all legitimate arguments. In order to establish reversible error, the defendant must demonstrate that the trial court abused its discretion. Breedlove v. State, 413 So.2d 1, 8 (1982). With these principles in mind, appellant has failed to establish that his trial counsel was deficient in his performance.

Rather than reviewing the comments in an isolated and distorted fashion, they should be reviewed in context of the entire trial. Muehlman v. State, 503 So.2d 310, 317 (Fla. 1987). The crux of this case centered on which witnesses the jury was going to believe as appellant relied on an alibi defense. The state presented evidence that the defendant was with the victim in Fort Lauderdale the weekend of the murder. The defense presented witnesses who testified that he (appellant) was in Boston that weekend. (R 1400-1496). The jury was repeatedly told that they would be the final judges of who was telling the truth and what weight should be given to the individual witnesses. (R 1397-1398, 1404, 1409).

The specific comments being challenged are nothing more than proper comments on the strength/weakness of all the evidence presented and the permissible inferences thereof or fair reply to arguments by the defense. (R 1409-1446, 1500-1505). The prosecutor stressed that his argument was not evidence but

merely comments on the evidence presented by both sides. (R 1395, 1404, 1409, 1423, 1426, 1454). The prosecutor's argument was not improper. Craig v. State, 510 So.2d 857, 865 (Fla. 1987).

To the extent that appellant claims there was an improper reliance on lack of remorse appellee would make the following argument. The prosecutor's comment regarding lack of remorse was made in reference to the applicability of a specific aggravating factor and therefore it was permissible. (R 1595-1596, 1601). Muehlman v. State, 503 So.2d at 317 (Fla. 1987).

Furthermore, there is absolutely no evidence to suggest that the judge and jury improperly relied upon lack of remorse as an aggravating factor. The jury was properly instructed on what factors they were to consider. The judge's sentencing order does not mention lack of remorse. Furthermore on direct appeal, the Florida Supreme Court did not consider any nonstatutory mitigating factors. Duest v. State, 462 So.2d 446, 449-459 (Fla. 1985). Appellant has failed to establish that the lack of remorse was considered. Wainwright v. Goode, 464 U.S. 78, 78 L.Ed.2d 187, 104 S.Ct. 378 (1983); Barclay v. Florida, 463 U.S. 939, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983).

Even if lack of remorse was improperly considered, any error would be considered harmless given the strength of the aggravating factors. Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986); Grossman v. state, 525 So.2d 833 (Fla. 1988); Pope v. Wainwright, 496 So.2d 798, 802-803 (Fla. 1986).

Lastly appellant claims that the prosecutor impermissibly made reference to irrelevant characteristics of the victim. The prosecutor's reference to the age of the victim along with a passing reference to the fact that he had a family does not demonstrate any reversible error under Florida law consequently, defense counsel was not deficient in his failure to object. The comments were made in reference to the existence of an aggravating factor. Mere reference to the victim or his family is of little impact and does not require reversal. Bush v. State, 461 So.2d 936, 941 (Fla. 1984); Johnson v. State, 442 So.2d 185, 188 (Fla. 1983); Bush v. Dugger, 16 F.L.W. S233 (Fla. March 28, 1991). Appellant's reliance on Taylor v. State, 16 F.L.W. S469, 471 (Fla. June 27, 1991) is unpersuasive as there was no prolonged attempt to elicit the sympathy of the jury by emphasizing the fact that the victim could not enjoy life as the defendant would be able to if sentenced to life. Taylor.

Unlike the excessive focus on the characteristics of the victim that took place in Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), the prosecutor's comments in the case sub judice do not warrant relief. Facts about a victim developed during the course of a trial are not necessarily error. Brooks v. Kemp, 762 F.2d 1383, cert. granted and vacated 106 S.Ct. 3325, 478 U.S. 1016, 92 L.Ed.2d 732, affirmed on remand, 809 F.2d 700, cert. denied, 107 S.Ct. 3240, 483 U.S. 1010, 97 L.Ed.2d 744, on subsequent appeal 385 S.E.2d 81, cert. denied, 110 S.Ct. 13423, 108 L.Ed.2d 498 (Fla. 1987).

Finally reference to appellant's lack of military history were made to rebut a claim that he served in Viet Nam. They were made not as evidence of nonstatutory aggravating factor but rather to negate the existence of an alleged mitigating factor. (R 1614, 1616). Trial counsel was not required to object. Muelhman.

In summary, appellant has failed to establish either deficient performance or prejudice therefrom, consequently this claim must be denied.

V.

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING REGARDING HIS BRADY CLAIM

Appellant claims that the district court, along with the state trial court, erred in denying his request for an evidentiary hearing regarding various Brady claims. As correctly pointed out by appellant, he received an evidentiary hearing regarding one of his alleged Brady violations. See issue. I. Appellant has failed to establish that he is entitled to a hearing regarding the remainder of his claim.

The district court denied appellant's request for an evidentiary because he has failed to establish that even if his allegations are true, he still would not be entitled to relief. (4-65-12-13). Agan v. Dugger, 835 F.2d 1337, 1338 (11th Cir. 1987) The district court's ruling was correct. Lindsey v. Smith, 820 F.2d 1137, 1150-1152 (11th Cir. 1987).

Appellant claims that the state withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The gravamen of a true Brady claim is that 1.) the prosecution, deliberately or negligently, withheld evidence, 2.)which was favorable or exculpatory and 3.) that evidence was material. Materiality has been defined as : if there is as reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, 473 U.S. 667, 682

(1985). With these principles in mind it is clear that appellant cannot establish either the requisite exculpatory nature of the information or the materiality of same. An evidentiary hearing is not warranted. Smith; Kennedy v. Dugger, 5 FLW Fed. C990, 992 (11th Cir. May 31, 1991).

Furthermore, the circumstances regarding how he has now come into possession of this exculpatory evidence has not been plead. Nor has appellant established how any of this information could not have been discovered with any reasonable diligence. As such this information cannot be considered Brady material. Jarrell v. Balkom, 735 F.2d 1242, 1258 (11th Cir. 1984).

Appellant's first alleged instance of Brady material is that the state withheld a pretrial statement made by a state witness, Neil O'Donnell. He claims that the withheld statement was inconsistent with O'Donnell's trial testimony and therefore was material for impeachment purposes. The alleged inconsistency centers around from whom did O'Donnell hear the appellant being referred to as "Danny".

A comparison of the two statements reveals that they are consistent, consequently the pretrial statement is not favorable or exculpatory. At trial O'Donnell testified to the following;

> Q: By any chance did you to happen to ever hear him be referred to by name, he being the young man in the jogging suit?

> A: Conversation across the bar with him talking to people, I believe I heard the name of Danny, but I mean I'm not sure.
>
> I couldn't swear to that. That name sticks out in my mind that I heard him when he was talking with the other people.
>
> (R 576).

Appellee fails to see how this statement differs from the pretrial statement. Furthermore, in light of O'Donell's complete trial testimony in which he positively identifies appellant as the one seen with the victim on the day of the murder, the pretrial statement is not material.(R 596, 570, 586).

Appellant next alleges that an unnamed witness told police that the defendant had bushy hair and had been in the bar on three previous nights. Appellant claims that this information was material due to its impeachment value. In light of the overwhelming evidence presented at trial which established appellant's presence in Fort Lauderdale with the victim that weekend the outcome of the proceeding would not have been different had the jury heard this unnamed witness's testimony. Duest v. State, 462 So.2d

Also without merit is appellant's claim that state witness Michael DiMizio gave a pretrial statement which was inconsistent with his trial testimony. The inconsistency involves the time that DiMizio said he saw appellant with the victim's car, i.e. between 2:00 and 2:30 or after 3:30. In both statements DiMizio stated that the time could have been later.

At trial he stated that he was not sure of the time. (R 665). Use of this statement to impeach DiMizio would not have changed the outcome of this case as the statement does nothing to bolster appellant's alibi defense or negate the state's evidence that appellant was with the victim.

Likewise without merit is the claim that Robert Harris had exculpatory information,i.e. that the victim was in excellent health and that he (the victim) cared for his roommate, David more than David cared for him. There is absolutely no evidence to even suggest that the roommate was responsible for this crime. Appellee fails to see how the victim's physical shape or his feelings for his roommate amount to material evidence. Bagley.

The following statements are equally lacking in materiality. The first officer to respond to the victim's home, described the blood at the scene as "fresh". Appellant claims that this evidence implicates the guilt of the victim's roommate. At trial the medical examiner testified that death had occurred more or less within four hours of 9:30 P.M. (R. 913-914). The jury was also aware that the roommate arrived home between 6:30-8:00. Had the jury heard the officer's description of the blood as "fresh", the outcome of the proceedings would not have changed. Appellant also claims that the state withheld Robert Harris's statement that the victim was in financial trouble and that neither the victim nor his roommate had any expensive jewelry. These statements would have contradicted appellant's statement to DiMizio that the stolen jewelry was

worth $15,000. Appellee fails to see how Harris's statements are material. At best they illustrate that appellant either lied about or exaggerated the value of the property. More importantly the fact that appellant discusses the stolen property negates his alibi defense. The statement is anything but exculpatory.

Lastly the fact that the pack of Marlboro cigarettes discovered at the scene was not found until two days after the murder and the fact that the state had police reports inconsistent with an alleged statement by appellant that he had never committed a murder before are not material.

Whether or not the cigarettes found belonged to appellant or not does not negate the other evidence of his guilt. In other words, if the cigarettes found belonged to appellant then that strengthens the state's case. However the absence of the cigarettes does not mean that he was not there. As for the materiality of the police reports appellant has failed to even state how they are inconsistent let alone demonstrate their exculpatory value.

In summation the district court correctly determined that appellant has failed to establish that he is entitled to any relief. None of the alleged instances of Brady evidence is material.

VI.

APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

Appellant claims that he received ineffective assistance of appellate counsel for counsel's failure to raise six specific issues on appeal. Those issues are: 1) inadmissibility of flight evidence, 2) inadmissibility of collateral misconduct, 3) sentencing court's failure to consider and list nonstatutory mitigating evidence, 4) erroneous jury instruction which impermissibly shifted the burden, 5) introduction and consideration of nonstatutory aggravating evidence, 6) erroneous jury instruction regarding the number of votes required for a life recommendation.

In assessing the effectiveness of appellate counsel the applicable standard is the same standard utilized to evaluate trial performance. Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987). Appellant must demonstrate deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). In order to establish deficient performance, appellant must show that counsel's failure to pursue those six claims was not reasonable. Then appellant must show that the result of the proceedings would have been different absent counsel's errors. Strickland, 466 U.S. at 687. Appellant has not meet his burden.

Appellate counsel is not required to pursue every nonfrivolous point. Jones v. Barnes, 463 U.S. 745, 751, 77 L.Ed.2d 987, 993, 103 S.Ct. 3308 (1983). Nor is counsel required

to pursue claims that were not properly preserved for appeal. Francois v. Wainwright, 741 F.2d 1275, 1285-1286 (11th Cir. 1984). Finally, deference is owed to the Florida Supreme Court's decision regarding the viability of underlying state law claims which appellant alleges would have been successful on appeal. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984).

With these principles in mind, appellant has failed to establish his claim. His argument is deficient on its face as he has not demonstrated how his six claims would entitle him to relief under Florida law. Cross v. U.S., 893 F.2d 1287, 1290 (11th Cir. 1990); Alvord, 725 F.2d at 1291. Likewise, appellant is not entitled to an evidentiary hearing on this claim since he has failed to establish prejudice. Harich v. Dugger, 844 F.2d 1464, 1471 n.7 (11th Cir. 1988). Furthermore the issue can be resolved based on the record already before this Court. Hill v. Lockart, 731 F.2d 568, 572 (8th Cir. 1984), affirmed, 474 U.S.. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Appellant claims that appellate counsel should have challenged the admissibility of both collateral crime evidence and flight. The Florida Supreme Court found that neither issue would have been successful on appeal. Duest v. Dugger, 555 So.2d 849, 852-853 (Fla. 1990). The district court properly relied on the applicable Florida law and concluded that appellate counsel would not have been successful on appeal regarding these issues. (65- 27, 48-49). Alvord, 725 F.2d at 1291.

Also without merit are appellant's claims regarding impermissible nonstatutory aggravating factors and an erroneous instruction on the number of votes required for a life recommendation. The Florida Supreme Court refused to find appellate counsel ineffective because both claims were not preserved for review. As such counsel cannot be deemed ineffective for failing to raise nonpreserved claims. Duest, 555 So.2d at 852. Francois v. Wainwright, 741 F.2d 1275, 1285-1286 (11th Cir. 1984).

The district court properly concluded that the respective substantive claims raised as issues XI and XXV in his petition were procedurally barred for failure to raise them on direct appeal. Teague v. Lane, 489 U.S. 288, 298-299 (1989).(65-27-28, 30-31).

The final two claims that appellant claims should have been pursued on direct appeal are, the failure of the court to consider nonstatutory mitigating evidence and a challenge to the capital sentencing instruction which allegedly shifts the burden of proof. The Florida Supreme Court determined that neither claim was preserved for appeal, consequently, appellant counsel cannot be ineffective for failing to pursue them. Duest, 555 So.2d at 852, 853. That determination was correct. Francois.

The district court reached the merits of the first claim, finding that there is no evidence to suggest that the court did not consider all the mitigating evidence presented. (65- 47). The state record clearly supports that finding. The

trial court's order stated that the mitigating presented did not outweigh the aggravating factors. (R. 1806). After hearing all the evidence the trial court ordered a presentence investigation. All the evidence presented in the presentence report consists of nonstatutory mitigating evidence. The contents of the report were fully discussed. (R 1576-1588, 1638, 1649,1805-1831.) The trial court instructed the jury on the appropriateness of considering nonstatutory mitigating evidence. (R 1627-1628). Finally, at the hearing on appellant's collateral motion, the trial court stated that she did in fact consider all the evidence that was presented. (PC.R. 122, 680).

The fact that the judge's order does not specify or outline the mitigating evidence considered does not establish that such evidence was not considered. Echols v. State, 484 So.2d 568 (Fla. 1985); Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984); Harich v. Wainwright, 813 F.2d 1082, 1101-1102 (11th Cir. 1987), rehearing granted on other grounds, Harich v. Dugger, 844 F.2d 1464, 1468-1469 (11th Cir. 1988).

The district court also concluded that since the substantive claim regarding burden shifting was without merit, appellant cannot possibly establish prejudice under Strickland. (65-25-26, 33-34). The district court's determination was correct. The jury instructions regarding Florida's sentencing scheme correctly outlines the procedure to be followed in determining an appropriate sentence. The scheme and language have been approved by both this Court and the United States

Supreme Court. Bertolotti v. Dugger, 883 F.2d 1503, 1525 (11th Cir. 1989); Kennedy v. Dugger, 5 FLW Fed.C990, 994 (11th Cir. May 31, 1991); Proffitt v. Florida, 428 U.S. 242, 248-251, 96 S.Ct. 2960, 2965-66, 49 L.Ed.2d 913 (1976); Blystone v. Pennsylvania, 494 U.S. __, 108 L.Ed.2d 255, 110 S.Ct. __ (1990); Boyde v. California, 494 U.S. __, 108 L.Ed.2d 316, 110 S.Ct. __ (1990); Walton v. Arizona, __U.S. __, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

In summation appellant has failed to establish that he received ineffective assistance of appellate counsel because the issues he alleges should have been raised were either not preserved for appellate review or would have been unsuccessful if challenged on direct appeal.

VII.

THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE CONVICTION FOR FIRST DEGREE MURDER

Appellant claims there was insufficient evidence to establish his guilt beyond a reasonable doubt. He claims that there was insufficient evidence of premeditation to sustain the conviction. The Florida Supreme Court determined that there was sufficient evidence of premeditation. Duest v. State, 462 So.2d 446, 449 (Fla. 1985). The district court properly concurred in that finding. (65-28-29).

Under the applicable standard as articulated in Jackson v. Virginia, 443 U.S. 307 (1979); "the proper inquiry is not whether the reviewing court believes that the evidence established guilt beyond a reasonable doubt but 'whether, after the viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Jackson, 443 U.S. at 319. There was sufficient evidence to establish appellant's guilt beyond a reasonable doubt.

VIII.

THE SENTENCING JURY INSTRUCTIONS WERE CONSTITUTIONAL HOWEVER, THE DISTRICT COURT CORRECTLY FOUND THIS CLAIM TO BE PROCEDURALLY BARRED

Appellant challenges the application of two aggravating factors; "heinous atrocious and cruel", and "cold calculated and premeditated". Appellant claims that both factors are unconstitutionally vague.

In his post-conviction motion appellant raised both of these claims. The trial court and the Florida Supreme Court found the challenge to the "cold calculated and premeditated" factor to be barred for failure to raise it on direct appeal. Duest, 555 So.2d 849, 853 (Fla. 1990). The district court properly deferred to that adequate and independent state procedural bar. Wainwright v. Sykes, 433 U.S. 72 (1977). (65- 8).

Appellant has failed to establish cause and prejudice to overcome his procedural bar. As such this claim should be summarily denied. Presnel v. Kemp, 835 F.2d 1567 (11th Cir. 1988). His reliance on Hitchcock v. Dugger, 481 U.S. 393 (1987) is totally misplaced. Hitchcock, deals with the presentation of nonstatutory mitigating evidence and the unconstitutionality of it's exclusion from the jury and judge. Channeling of a sentencer's discretion, including the claim that the aggravating factors are vague and overboard has been addressed by the United States Supreme Court long before appellant's direct appeal. Proffitt v. Florida, 428 U.S. 242 (1976). As such, appellant

cannot establish cause for his failure to bring his claim before now.

Appellant's challenge to the constitutionality of the "heinous atrocious and cruel" aggravating factor is also in procedural default and without merit. The trial court found the claim to be procedurally barred for failure to raise it on direct appeal. The Florida Supreme Court found the claim to be waived for purposes of appellate review because counsel failed to properly address the issue in his appellate brief. Duest, 555 So.2d at 852. The district court did not consider the waiver to be independent and adequate. (65- 7-8). The court did however find the claim to be procedurally barred based on the fact that the Florida Supreme Court would have barred the claim if it was presented in his brief. Teague v. Lane, 489 U.S. 288, 298-299 (1989). (65,24-25). The district court properly recognized that Florida courts faithfully applies its procedural bar. Dugger v. Adams, 489 U.S. 401, 410, n.6, (1989);

Lastly appellant's argument is without merit as this Court has rejected this identical claim. Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990).

In summary the district court correctly determined that the issue was procedurally barred. In the alternative, appellee would state that the claim is without merit.

IX.

THE INTRODUCTION OF APPELLANT'S ESCAPE ATTEMPT AND HIS USE OF AN ALIAS DID NOT VIOLATE ANY CONSTITUTIONAL RIGHT

Appellant claims that he was denied a fair trial when the state introduced evidence of flight and evidence of his use of an alias. The Florida Supreme Court found this claim to be procedurally barred for failure to raise it on direct appeal. Duest, 555 So.2d 849, 851. The district court properly upheld that independent and adequate state procedural bar. (65- 8). Wainwright v. Sykes, 433 U.S. 72 (1977); Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989). Since the district court found this claim to be procedurally barred, Appellant must establish cause and prejudice in order to overcome the procedural hurdle. Appellant has not even addressed this issue in his brief. As such this claim should be denied as a matter of law. Presnell v. Kemp, 835 F.2d 1567 (11th Cir. 1988).

In the alternative appellant's claim lacks merit as well. In order for a state evidentiary ruling to rise to the level which would warrant habeas relief, the ruling must deny appellant of fundamental fairness. Smith v.Wainwright, 741 F.2d 1248, 1258 (11th Cir. 1984). Fundamental fairness means that the challenged evidence is "material in the sense of a crucial, critical, highly significant factor". Smith, (quoting Jameson v. Wainwright, 719 F.2d 1125, 1127 (11th Cir. 1983), cert. denied, 466 U.S. 975 (1984). Appellant cannot demonstrate any such error.

The Florida Supreme Court has already ruled this evidence to be admissible and relevant. Duest, 555 So.2d at 852. Furthermore, the admission of such evidence cannot be deemed "crucial, critical, highly significant factor". Appellant cannot establish any constitutional violation. Smith.

X.

THE JURY INSTRUCTIONS REGARDING THE NUMBER OF VOTES REQUIRED TO IMPOSE A LIFE SENTENCE DID NOT RESULT IN ANY CONSTITUTIONAL VIOLATION, FURTHERMORE,THIS CLAIM IS PROCEDURALLY BARRED

Appellant claims that he was constitutionally prejudiced by the jury instructions regarding the number of votes required for a life recommendation. The state trial court found this claim to be procedurally barred for failure to raise it on direct appeal. (PC. R. 679-680). The Florida Supreme Court found the claim waived because appellant did not properly brief the issue in his appeal. Duest, 555 So.2d at 852. The district court properly found this claim to be procedurally barred. (65-30-31). The court properly reasoned that had it been presented to the Florida Supreme Court, the procedural bar found by the trial court would have been upheld. Teague v. Lane, 489 U.S. 288, 288-299 (1989).

Since this claim is precluded from federal review, appellant must establish cause and prejudice to overcome his state default. Presnell v. Kemp, 835 F.2d 1567 (11th Cir. 1988). Appellant has failed to address this dispositive aspect of the district court's order. As such this claim should be denied as a matter of law. Presnell; Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984).

In the alternative, appellant's claim lacks merit as well. Appellant has failed to establish the critical factor

regarding this claim, there is no indication that the jury was ever deadlocked. (R.1634-1637). Furthermore the written instructions given to the jury clearly state that a recommendation of life requires only six votes (R.1800). Their recommendation was based on a majority vote. There is no constitutional violation. Henry, supra.

XI.

THE PENALTY PHASE JURY INSTRUCTIONS CORRECTLY DESCRIBE FLORIDA'S CAPITAL SENTENCING SCHEME

Appellant claims that the jury instructions regarding sentence impermissibly shift the burden to him to prove that death is not the appropriate penalty. The district court correctly found this claim to be without merit.

The instructions given in the instant case are identical to those previously upheld before this court. (R-1626-1627). Bertolotti v. Dugger, 883 F.2d 1503, 1525 (11th Cir. 1989); Kennedy v. Dugger, 5 F.L.W. Fed. C990, 994 (11th Cir. May 31, 1991); The United States Supreme Court has also found this claim to be without merit. Walton v. Arizona, __ U.S. __, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

CONCLUSION

WHEREFORE, based on the foregoing facts and relevant case law, appellee asserts that appellant is not entitled to any relief. The district court's order should be **AFFIRMED** in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by United States Mail to: MARTIN J. McCLAIN, ESQ. and GAIL E. ANDERSON, ESQ., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 7th day of October, 1991.

Of Counsel

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